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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924 1925

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error, and
Petitioner for Writ of Certiorari.

vs.

STATE OF GEORGIA, as Owner of Western & Atlantic Railroad,

and

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
As Lessees operating said Railroad under the corporate name and style of Western & Atlantic Railroad,
Defendants in Error, and
Respondents to Petition for Writ of Certiorari.

No. 243 24

BRIEF FOR WESTERN UNION TELEGRAPH COMPANY

Plaintiff in Error and Petitioner for Writ of Certiorari.

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BRIEF FOR WESTERN UNION TELEGRAPH COMPANY,

Plaintiff in Error and Petitioner for Writ of Certiorari.

STATEMENT OF FACTS.

This is error (and certiorari) to the supreme court of Georgia, to review a judgment of that court (record, pg. 521) affirming by operation of

law (the court being equally divided, three to three) a decree of the superior court of Fulton county (record, pg. 335) directing the Western Union Telegraph Company to remove its telegraph lines from the right of way of the Western and Atlantic Railroad.

The Western and Atlantic Railroad, running from Atlanta, Ga., to Chattanooga, Tenn., is owned by the State of Georgia, and is leased to the Nashville, Chattanooga & St. Louis Railway.

THE FEDERAL QUESTION

The Western Union lines along the Western and Atlantic Railroad are its trunk lines between Atlanta and Chattanooga and a vital artery of its national communication system. They have been maintained on the right of way of the State-owned railroad by the Western Union and its predecessors in title for nearly seventy years. It was and is the claim of the Western Union that it has a perpetual right of way for these lines by virtue of one or more of three separate contracts with the State of Georgia, which we may refer to as (1) the Garst and Bean contract; (2) the Augusta, Atlanta & Nashville Magnetic Telegraph Company charter; and (3) the contract of 1870 (Exhibits A, B and C, appendix pgs. 86, 90, 94). The present action, brought by the State of Georgia to compel the Western Union to remove its lines, was brought in pursuance of the direction of a statute of that State which became effective November 30, 1915,

and an amendatory statute of August 4, 1916, pertinent portions of which statutes are printed in full in the appendix (Exhibits D and E, appendix, pgs. 100, 105). In substance, these statutes created an administrative body known as the Western and Atlantic Railroad Commission; charged it with the duty of determining the terms upon which the State-owned railroad should be leased; empowered it to determine what steps should be taken to assert the right of the State to any portion of the railroad right of way adversely used and occupied, and directed the commission to "deal with, and dispose of, any and all encroachments upon, and uses and occupancies of, any part of the right of way * * * by any person other than the present lessee * * whether such encroachment, use or occupancy be permissive or adverse, and whether with or without claim of right therefor." The commission was also authorized by these acts "to take such action as it may deem proper and expedient to cause the removal and discontinuance of any encroachment * * * which in its opinion should be removed or discontinued," and "to this end" it was authorized and empowered to bring such suits and other legal proceedings in the name of the State of Georgia as it might deem appropriate.

This Commission adopted a resolution (Exhibit F, appendix pg. 107) directing the institution of this suit.

It is the contention of the Western Union **that these acts of the legislature of Georgia, as con-**

strued and applied by the State courts in this suit, and the action of Georgia through her W. & A. R. R. Commission, impair the obligation of the two contracts made by Georgia with the predecessors in title of the Western Union and of the one contract made by Georgia directly with the Western Union, which have already been referred to, contrary to article 1, section 10, paragraph 1 of the Constitution of the United States.

HOW THE FEDERAL QUESTION WAS RAISED.

The suit was commenced by a petition filed in the superior court of Fulton county, which set forth the Georgia act of 1915 and its amendment; alleged that, pursuant to said statutes, Georgia had leased this railroad to the Nashville, Chattanooga & St. Louis Railway for a term of fifty years by a lease dated May 11, 1917; alleged that "paragraph fourteen of said lease * * * reserves to the State of Georgia the right to remove and cause to be discontinued any or all encroachments and other adverse uses and occupancies in and upon the right of way * * * whether maintained under claim of right or otherwise, and to this end * * * the lessee consented that the State may withhold delivery of possession, or right of possession, of such parts of the right of way * * as may be so adversely used and occupied until such encroachments and other adverse uses and occupancies shall have been removed or discontinued"; alleged

that the Western and Atlantic Railroad Commission, "pursuant to the authority and direction of said act" (record, pg. 77) had adopted a resolution authorizing the bringing of this suit in the name and behalf of the State of Georgia, and that "in accordance with such authority and direction from the Western and Atlantic Railroad Commission this suit is brought" (ibid). The contracts on which the Western Union relies for its title were not referred to in the petition. Accordingly, the defendant filed an answer setting up the three contracts in detail (record, pgs. 91 to 93) and alleged further that

"If the Georgia act of November 30, 1915, or any amendment thereto has the force and effect and delegates the authority" claimed by the State, "then said statute is opposed to the Constitutions of the United States and of Georgia * * * and any judgment or decree of any court giving to said statute the force and effect" claimed by the State, "and any judgment or decree of any court granting the prayers of the petition in this cause will be violative of the Constitutions of Georgia and of the United States in that thereby

> "(a) there will be an impairment of the obligations of contracts by a statute or law passed or made subsequently which violates * * * United States Constitution, article 1, section 10, paragraph 1." (Record, pg. 107.)

The same defense is raised in defendant's separate affirmative plea, paragraph XXV. (record, pg. 169, 172).

Under the Georgia practice the point was properly raised, as a matter of pleading, by answer and plea: its legal sufficiency was properly tested by a motion to strike. The plaintiffs accordingly moved to strike various paragraphs of the answer and pleas. including the portion above quoted (see paragraphs 39, 40 and 41 of plaintiff's first motion to strike, record, pg. 130; and paragraph 59 of plaintiff's second motion to strike, record, pg. 194). These motions, so far as addressed to the portions of the answer and pleas above quoted, were granted (record, pgs. 131 and 195), and exceptions were duly taken by defendant (record, pgs. 133 and 196). These exceptions were preserved and insisted on in the supreme court of Georgia (bill of exceptions, record, pgs. 515, 518), and after the affirmance by that court were duly assigned as error (record, pg. 41).

A verdict and decree were rendered in favor of Georgia and her lessee requiring the Western Union to remove its lines "within twelve months from the final determination of this cause" (record, pgs. 535, 536).

A motion for new trial was filed in due time upon many grounds, complaining of error in rulings made during the trial and of error in verdict and decree (record, pgs. 515, 520).

Upon review by the Supreme Court of Georgia, a full bench of six justices evenly divided. Chief Justice Russell rendered one opinion concurred in by two other justices. Justice Custer rendered another opinion of diametrically opposite effect concurred in by two other justices.

With the exception of a discussion of the applicability of the doctrine of nullum tempus occurrit regi, the only question considered by either opinino, and upon the answers to which each opinion was entirely based, was:

> Was the Garst and Bean contract, or the statutory contract with the A. A. & N. M. Tel. Co., a valid contract?

Justice Russell's decision does not consider the claim that these contracts were transferred to the Western Union. Justice Custer's decision considers this claim and holds that these contracts were so transferred.

The Supreme Court of Georgia considered

(a) The validity of the Garst & Bean contract, at the time it was made, depending upon whether the chief engineer of the railroad had authority to make it. The contract granted an unrestricted easement for telegraph lines along the railroad right of way.

(b) The validity of **section six** of the Georgia statute of 1852 incorporating the A.

A. & N. M. Telegraph Company which in terms expressly referred to and ratified the Garst and Bean contract.

(c) The validity of the grant by **section nine** of that act which, without reference to, and independently of, the Garst and Bean contract, granted a perpetual easement along the right of way of this railroad for telegraph lines of the A. A. & N. M. Tel. Co.

The determination of the answers to the last two questions, (b) and (c), depended in the opinion of all the justices upon the effect of this provision of the then constitution of Georgia—"nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof" (Georgia Constitution of 1798, article 1, section 17).

The title of the Georgia statute of 1852 referred to is "An act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company."

Justice Russell's opinion is that the constitutional provision quoted rendered invalid sections 6 and 9 of the act of 1852, for the reason that the matter therein differs from that expressed in the title of the act. No prior Georgia decision was quoted or referred to in his opinion.

Justice Custer's opinion is of opposite effect, holding that sections 6 and 9 are not matter differ-

ent from that expressed in the title of the act and are valid. The opinion cites, quotes from and follows, unanimous decisions of the Supreme Court of Georgia and says:

> "In maintaining that a reversal by this court is required by the errors of the court below, we plant ourselves upon the proposition that in parts of the plea and amendments stricken the defendant showed a right to the easement contested, by grant; that is, under the contract between Mitchell and Garst & Bean, as affirmed and ratified by the General Assembly. And we think that the transmission of this title through successive conveyances to this defendant could be shown in the way indicated in defendant's answer. The facts and circumstances pleaded should have been left for the consideration of the jury; and we are of the opinion that in view of those facts and circumstances pleaded, as well as the documents introduced which bore upon the question of title, the jury would have been authorized to find against the State; **especially in view of the one monumental, towering, dominating fact, that this defendant and its predecessors in title has for nearly three-quarters of a century been in the peaceable enjoyment of the easement, the right to which is now denied it. If in any case a grant should be presumed, it should be presumed in favor of this defendant** under the facts alleged and proved in this record." (record, pg. 536).

Justice Russell's opinion, freely conceding that many errors had occurred during the trial (record, pg. 524), held that those errors were wholly immaterial because neither of these contracts was lawful or binding on Georgia (record, pgs. 524-526).

While Justice Russell's opinion does not so state, it does not deny, but seems to concede, that the Western Union had sufficiently deraigned and proved transition into itself of such title to these telegraph easements as Garst and Bean and the A. A. & N. M. Tel. Co. had acquired, but that as these grantees had acquired nothing, the result was that nothing had been transferred to the Western Union.

The Supreme Court of Georgia has repeatedly held that where its decision on one point will control a case before it on review, it will not consider or pass upon other questions duly presented even though its decision on those questions would sustain the error charged. In Benton vs. Singleton, 114 Ga. 548, the court said in headnote 4: "In no case will the Supreme Court undertake to pass upon questions presented by a bill of exceptions when an adjudication of them, even though favorable to the plaintiff in error, could not possibly result in any practical benefit to him." See also pages 557-558. In Palatine Ins. Co. vs. Dickenson, 116 Ga. 794, the Court said in the third headnote: "As the ruling made in the preceding headnote will result in a final disposition of the case, the other questions presented by the bill of exceptions will

not be now determined." To the same effect is Baird vs. City of Atlanta, 131 Ga. 451, h. n. 1.

Under this established practice of the Supreme Court of Georgia a determination of the validity of the Garst & Bean contract and of the statute of 1852 presented itself **at the outset** as one of the controlling features of the case.

Should the Supreme Court of Georgia hold this contract and statute to be invalid, that court, under its established practice, would not consider or pass upon the claimed transfer of the contract and rights thereunder to the Western Union.

Should that Court hold the contract and statute to be valid, then, and only in that event, would the Supreme Court of Georgia consider and pass upon the plead transfer of the contract with Garst & Bean and with the A. A. & N. M. T. Co. to the Western Union.

Therefore it is that Justice Russell's opinion, holding the Garst & Bean contract and the statute of 1852 to be invalid, did not attempt to pass upon the claimed transfer of those contracts to the Western Union, though freely conceding that many errors had occurred during the trial which the decision held, in conformity with the practice of the court, as above stated, were immaterial and that a judgment sustaining those claimed errors could not affect the judgment of the court.

Justice Custer's opinion, after holding the Garst & Bean contract and the statute of 1852 to be valid, then, pursuant to the practice of the Supreme Court of Georgia, considered and passed upon the plead transfer of those contracts to the Western Union, and held that the transfers were sufficiently plead, that the evidence offered would justify a verdict finding that those contracts and all rights thereunder had been lawfully transferred to the Western Union, and sustained the assignment of error on the striking of these portions of the plea and the exclusion of that evidence.

It therefore follows that the judgment of the Supreme Court of Georgia by a divided court, has sustained the verdict and decree of the lower court upon two grounds only:

1. The defense of prescriptive title and of laches is not available against the State of Georgia.

2. The Garst & Bean contract and the Georgia statute of 1852 are invalid.

The judgment of the supreme court of Georgia must be considered as limited to these two points only and as not passing upon other assignments of error not specified in its decision as adjudicated thereby. Larrimore vs. Jones, 157 Ga. 366, 369-371, and cases above cited.

For the purpose of this writ of error, therefore, it must be assumed that the rights of Garst &

Bean and of the A. A. & N. M. Tel. Co., if any, have been duly transferred to the Western Union.

As the case turned in the Supreme Court of Georgia, as above stated, solely upon the validity or invalidity of these contracts, we limit this brief to that point—the one point controlling each of the opinions of the Supreme Court of Georgia,—and to the contract of 1870 not referred to in either opinion.

The even division of the justices, by operation of law, affirmed the trial court.

A petition for rehearing (record, pg. 537), as amended (pg. 549), was denied without opinion (pg. 549). The denial of the petition for rehearing was on September 29, 1923. The original transcript of error and the printed record, pg. 549, erroneously state that the denial was on September 25, 1923. This error in the record is corrected by a stipulation of parties to the cause with a certificate of the Clerk of the Supreme Court of Georgia attached.

The case is here on writ of error, although out of abundant precaution certiorari was applied for, and consideration of the application postponed for hearing until the case is reached on the writ of error. We believe, however, that the point that the Georgia statute of 1915, and its amendment, impaired the obligation of one contract between the State of Georgia and the Western Union, and

the two contracts between the State of Georgia and the predecessors in title of the Western Union, is properly presented on writ of error.

CHRONOLOGY OF EVENTS FROM 1847 TO DATE OF SUIT (1920).

The Western & Atlantic Railroad, the only railroad ever owned by Georgia, was built and, prior to 1850, operated without the aid of telegraphic service.

In 1847 Georgia, to encourage the construction and operation of lines of telegraph, by statute granted the right to construct and operate without time limit telegraph lines "on or by the side of any public road or highway in this State." (Ex. A. record, pg. 452).

GARST & BEAN CONTRACT. In A. D. 1850, Georgia, for the expressly stated purpose of obtaining telegraphic service essential to the efficient and safe operation of her railroad, contracted with Garst & Bean for the construction of a line of telegraph along this railroad from Atlanta to Chattanooga to be owned and operated by a corporation to be called Augusta, Atlanta and Nashville Magnetic Telegraph Company, and expressly granted the use of her railroad right of way without time limit for this purpose.

In 1850 this line of telegraph was constructed. (Ex. 1, record, pgs. 138, 280).

AUGUSTA, ATLANTA & NASHVILLE MAGNETIC TELEGRAPH COMPANY CONTRACT.—In A. D. 1852, Georgia by statute incorporated the Augusta, Atlanta & Nashville Magnetic Telegraph Company to construct and operate lines of telegraph between the cities mentioned in the corporate name and elsewhere.

Section 6 of this statute expressly ratified the contract with Garst & Bean. (Bean was one of the named incorporators).

Section 9 of this Act, without reference to this contract with Garst & Bean, granted the corporation the right to construct and maintain without limit lines of telegraph "along and across * * * any railroad which now or may hereafter belong to this State." (record, pg. 280).

The Augusta, Atlanta & Nashville Magnetic Telegraphic Company was organized, accepted this charter, and maintained and operated its telegraph lines under these grants from Georgia (record, pg. 78).

The State of Georgia, and its lessees, have received and accepted continuous service from defendant and its predecessors in title by means of these telegraph lines in aid of the operation of the railroad.

It is alleged in the answer and pleas, and for the purposes of this writ of error must, we submit, be assumed by this court (in view of the striking out of the portions of the answer and pleas dealing with this question, and of the refusal of the supreme court of Georgia to determine whether such striking out was proper) that title to easements for this telegraph line passed into the Western Union Telegraph Company.

CONTRACT OF 1870. On August 18, 1870, a contract was made nominally by the W. & A. R. R., but in reality by the State of Georgia, approved by her Governor (infra pg. 78) with the Western Union Telegraph Company for the expressly stated purpose of providing "necessary telegraphic facilities" for her railroad, and for "a better understanding of the terms" on which the Western Union Telegraph Company "shall occupy the line of railroad * * * with the line or lines of telegraph wires belonging to" the Western Union Telegraph Company, and to permanently settle and define the business relations between Georgia and the Western Union Telegraph Company. This contract in express terms gave the Western Union Telegraph Company a "perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business and additional lines of poles whenever" it desired them (record, pg. 93, Ex. 7, record, pg. 116).

Under her statute of October 24, 1870, Georgia made the first lease of her railroad dated December 27, 1870, for 20 years (record, pgs. 218, 219). The lessee thereunder claimed at the outset that it was not bound by Georgia's contract of August 18, 1870, with the Western Union Telegraph Company; that the wire set apart under that contract for Georgia's use for her railroad belonged to Georgia; and that the lessee could use it without paying for its use as provided in the contract. The lessee used the wire and refused to pay.

In 1872 the Western Union Telegraph Company filed a bill in the United States District Court at Atlanta to compel the lessee to pay as provided in the contract of August 18, 1870. Its claim was sustained by this court, 91 U. S. 283. Subsequently the lessee on September 11, 1876, paid as the contract provided; and that contract continued in force, the lessee using and paying as therein provided, until, by agreement between a subsequent lessee and the Western Union Telegraph Company, another working contract was, as between the lessee and the Western Union Telegraph Company, put in force in 1890 at the second lessee's request (record, pgs. 299-300). That however did not affect the contract of August 18, 1870, as between Georgia and the Western Union Telegraph Company, or the perpetual easement thereby granted.

Until the institution of the present suit, no action had ever been instituted to eject the Western Union Telegraph Company or its predecessors

from the right of way of this railroad, to question or dispute its or their title, or to interfere with the maintenance and operation of these lines of telegraph. The only suit ever instituted, in which any of the three contracts relied upon was involved, was the suit above mentioned in 1872 by the first lessee of the railroad.

From 1850 continuously these lines of telegraph have served Georgia and her railroad. The report of Mitchell, the Chief Engineer of the railroad, in 1850 (record, pg. 138), and testimony of MacDonald, the Chief Engineer of the present lessee, and an important witness of the plaintiff upon the trial (record, pg. 235), emphatically state that since 1850 these lines of telegraph were absolutely essential to the safe, speedy and economic operation of this railroad. They were entirely indispensable. The service they afforded was of great value.

Now, at the instance and at the expense of the present lessee, Georgia and its lessee seek to remove and destroy these telegraph lines. The Western Union Telegraph Company and its predecessors, servitors who, under grant in perpetuity, have for about seventy (70) years aided in making populous the forest wilds of north Georgia, and in establishing a great trunk line of communication of the northwest, suffering in so doing the financial stress of early unremunerative years, of four years of civil war and the following period of economic strain, are now awarded a decree annihilating these lines. The axe is about to fall. To this court an appeal is made.

SPECIFICATION OF ERRORS RELIED ON.

I.

Impairment of Contract.

Assignments of Error I, II, III complain of impairment of contracts by (a) the Georgia act of November 30, 1915, and its amendment, (Ass. Er. I), (b) Georgia's lease of 1917 pursuant to that act (Ass. Er. II), (c) action of Georgia's Western & Atlantic Railroad Commission (Ass. Er. III). Ground 1 of petition for certiorari is a consolidation of these three assignments of error.

Inasmuch as the contracts impaired and specified in each of the first three assignments of error are the same, the only difference being that the error is assigned separately upon the statute, the lease and the action of the W. & A. R. R. Commission, these three assignments are consolidated into one specification of error so as to relieve the court of reading what otherwise would be repeated. With this object in view specification I is thus stated.

(a) Georgia statute of Nov. 30, 1915, and its amendment of Aug. 4, 1916, impair contracts.

"Error is assigned upon the final judgment or decree of the Supreme Court of Georgia, being the

highest court of the State in the above cause where is drawn in question the validity of a statute on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of the validity of that statute, to wit:

"The statute of the General Assembly of Georgia entitled 'An Act to provide for the leasing or other disposition of the Western & Atlantic Railroad and its properties; for the creation of a commission to effectuate such purpose, and to define its powers and duties; making an appropriation for the cost of the work required, and for other purposes,' approved November 30, 1915, (Georgia Laws 1915, Extraordinary Session, pg. 119) and the amending act approved August 4th, 1916, each of which are in the petition in this cause alleged to be the foundation of this suit and the basis of the decree therein sought.

"Said statute and its amendment violates the Constitution of the United States, Art. 1, Sec. 10, Par. 1, in that the said statute of November 30, 1915, and its amendment, is a law passed by the State of Georgia impairing the obligation of a contract, and of each of the" contracts below stated. (Ass. Er. I, record, pg. 41).

(b) "Lease by Georgia to N. C. & St. L. Railway impairs contracts.

"Error is assigned upon the final decree or judgment of the Supreme Court of Georgia in the above cause, where is drawn in question the validity of an authority exercised under the State of Georgia on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of the validity of that authority, to wit:

"The lease of May 11, 1917, of the Western & Atlantic Railroad to the N. C. & St. L. Railway for a term of Fifty (50) years pursuant to the Georgia Act of November 30, 1915, plead in paragraph V of the petition and fully set forth in the brief of evidence. The said lease, an authority exercised under the State of Georgia, violates the Constitution of the United States, Art. 1, Sec. 10, Par. 1, in that it impairs the obligation of a contract. and of each of the" contracts below stated. (Ass. Er. II, record, pg. 46).

(c) "Action of Georgia through its Western & Atlantic Railroad Commission impairs contracts.

"Error is assigned upon the final judgment or decree of the Supreme Court of Georgia in the above cause, where is drawn in question the validity of an authority exercised under the State of Georgia on the ground of its being repugnant to the Constitution of the United States, and the de-

cision is in favor of the validity of that authority, to wit:

"The resolution of the Western & Atlantic Railroad Commission plead in paragraph VIII of the petition, and copy of which is attached as exhibit 14 to defendant's answer, declaring the Western Union Telegraph Company's lines to be an encroachment upon the right of way of the Western & Atlantic Railroad; declaring the Western Union Telegraph Company to be a trespasser on said right of way without right; and directing the institution of this suit for the removal of the lines of the Western Union Telegraph Company so that, in fulfillment of its obligation to its present lessee under the lease executed pursuant to the act of 1915, the State of Georgia may place in the possession of the N. C. & St. L. Ry., its present lessee, the very easements now occupied and possessed by the Western Union Telegraph Company.

"The said resolution, an authority exercised under the State of Georgia, violates the Constitution of the United States, Art. 1, Sec. 10, Par. 1, in that it impairs the obligation of a contract, and of each of the" contracts below stated. (Ass. Er. III, record, pg. 49).

The contracts whose obligations are violated are the following:

"1. A contract entered into October 11, 1850, between the State of Georgia and David W. Garst

and James M. Bean, a copy of which is attached to an amendment to defendant's answer.

"Georgia, by this contract, granted a perpetual, irrevocable and assignable easement for telegraph lines to Garst & Bean along the Western & Atlantic Railroad from Atlanta to Chattanooga.

"This contract was expressly plead in the original answer, paragraph VI (3), and in paragraph XVI amending the same; in defendant's separate plea in paragraph XX (2) of the amendment to its plea and answer, in the next to the last paragraph of that plea; in exhibit 22 (2) attached to the amendment to defendant's answer and plea and referred to in paragraph XXI, XXII, XXIII, XXIV thereof; and was again plead particularly in a separate plea in paragraph XXV (a) (2).

"2. The contract made with the Augusta, Atlanta & Nashville Magnetic Telegraph Company by the State of Georgia by the charter granted by act of the Legislature of Georgia entitled 'An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company,' approved January 27, 1852, and particularly the two contracts made by section 6 and by section 9 of that act, to wit:

"Section 6 of that act in express terms ratified the above mentioned contract made by the State of Georgia with Garst & Bean October 11, 1850.

"Section 9 of that act, without reference to the Garst & Bean contract, gave a separate and dis-

tinct grant in the following language: 'That the Augusta, Atlanta & Nashville Magnetic Telegraph Company shall have power and authority to set up their fixtures along and across any * * railroad which now or may hereafter belong to this State.'

"The easement granted was irrevocable, assignable and perpetual. This grant was without time limit.

"This contract was expressly plead in defense in the original answer, paragraph VI (3); in defendant's separate plea in paragraph XX (3) of the amendment to its answer and plea, and in the next to the last paragraph of that plea; in the exhibit 22 (3) attached to the amendment to defendant's answer and plea referred to in paragraphs XXI, XXII, XXIII, XXIV thereof; and was again particularly plead in a separate plea in paragraph XXV (a) (3).

"3. The contract between the State of Georgia signed in its behalf by its Governor and the Superintendent of the Western & Atlantic Railroad and duly sealed, and also signed by the Western Union Telegraph Company, dated August 18, 1870.

"The preamble of this contract recites that the agreement was entered into 'in order to provide necessary telegraph facilities for the party of the second part (W. & A. R. R.) and to a better understanding of the terms on which the party of the first part (W. U. T. Co.) shall occupy the line of

railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto.' In the body of the contract is a grant from the State of Georgia to the Western Union Telegraph Company of a 'perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business and additional lines of poles whenever' the Western Union Telegraph Company shall so elect.

"This contract was expressly plead in defense in the original answer, paragraph VI (10) with a copy attached as exhibit 7; in defendant's separate plea in paragraph XX (11), and in the next to the last paragraph of that plea; in exhibit 22 (15) attached to the amendment to defendant's answer and plea, and referred to in paragraphs XXI, XXII, XXIII, XXIV thereof; and was again plead particularly in a separate plea in paragraph XXV (a) (4)." (Assignment of Error III, record, pg. 49).

Following the foregoing in the assignments of error, and in support of them, is a statement of various facts disclosed by the record.

ARGUMENT.

I.

If a perpetual right of way exists, under any contract, for the telegraph lines on the Western & Atlantic Railroad, there can be no question that such contract is "impaired" by the Georgia Acts of 1915 and 1916, as construed and applied by the courts below.

That a contract for a perpetual right of way is impaired by a legislative act, the effect of which is to require the owner of the right of way to remove its property therefrom, is too plain for discussion. That such is the legal effect of the Georgia acts of 1915 and 1916, as construed and applied, is equally clear.

These acts are the foundation of the suit. Without the suit, there could have been no decree directing the removal of the telegraph lines; without the act of 1915, as amended in 1916, there could have been no such suit. The petition in the Fulton County superior court expressly alleged that the suit was brought in accordance with the authority and direction from the Western and Atlantic Railroad Commission; that the Western and Atlantic Railroad Commission was created by the act of 1915, and given authority by the act of 1916 to deal with encroachments and institute and prosecute suits for their removal; and that the direction by the commission to its counsel to institute and prosecute the present suit was given by it "pur-

suant to the authority and direction of said act" (record, pg. 77.) No technical objection can therefore be urged that the alleged impairment of the contracts is solely by the judgment of a court as distinguished from the enactment of a State law. "It is apparent that the trial court gave effect to the act * * * although the precise extent is not clearly disclosed," said this court in the recent case of Columbia Railway, etc., v. South Carolina, 261 U. S. 236, 246: "Whatever it was, it entered into and affected the judgment, and this judgment was affirmed by the supreme court." It cannot be denied, and we do not understand that counsel for the State undertake to deny, that the trial court gave some effect to the acts of 1915 and 1916, "pursuant to the authority and direction of" which, and pursuant to that alone, this suit was brought. The precise extent, indeed, is clearly disclosed. The act, as amended, was the whole foundation of the suit.

Georgia statutes of 1915 and 1916, and the action of her W. & A. R. R. Commission, being by decree in this cause given a construction or application whereby a contract is impaired, this court takes jurisdiction.

This court has held that if an Act of the State Legislature is **by judicial decree** given a construction whereby a contract is impaired, this court should take jurisdiction.

In Bridge Proprietors vs. Hoboken Co., 1 Wall. 144, this court said:

> "It is said, however, that it is not the validity of the act of 1860 which is complained of by plaintiffs, but the construction placed upon that act by the State court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no State Legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

On page 145 the court said:

> "The act which was really the subject of construction, was the act of 1790, under which plaintiffs claim. For if that act **and the proceedings under it** amounted to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void as impairing that contract."

In Williams vs. Bruffy, 96 U. S. 176, this court said on page 184 "the constitutional provision prohibiting a state from passing a law equally prohibits a state from **enforcing** as a law an enactment of that character, from whatever source

originating," referring to enforcement by judicial decree.

This language is repeated in A. C. L. R. R. Co. vs. Goldsboro, 232 U. S. 555 and in Reinman vs. Little Rock, 237 U. S. 176, below cited.

Under the decisions of this court, not only the Georgia Statutes of November 30, 1915, and of August 4, 1916, but also the actions of the Western & Atlantic Railroad Commission and its resolutions, and the lease of 1917 to the N. C. & St. L. Ry., made pursuant to that Act and to those resolutions, each come within the inhibition of Article 1, Sec. 10, Par. 1, of the Constitution of the United States plead in defendant's answer prohibiting a state from passing a law impairing the obligation of a contract.

Arkadelphia Co. vs. St. Louis & S. W. Ry. Co., 249 U. S. 134, 141 (order of State Railroad Commission).

Reinman vs. Little Rock, 237 U. S. 171, 176 (municipal ordinance).

A. C. L. R. R. Co. vs. Goldsboro, 232 U. S. 548, 555, (municipal ordinance).

Silence of supreme court of Georgia upon constitutional questions raised not affect jurisdiction of this court.

The silence of the supreme court of Georgia upon questions raised under the Constitution of

the United States does not affect those questions or the right of appeal to this court.

Corn Products Refining Co. vs. Eddy, 249 U. S. 427, 432.

Dahnke-Walker Co. vs. Bondurant, 257 U. S. 282, 289.

This court determines for itself validity and effect of Georgia act of 1852 to ascertain if contract claimed was in fact made.

While due deference is given by this court to the opinions and decisions of State courts, this court has always held that it must for itself decide, where impairment of a contract is claimed, whether in fact a contract did in the first instance exist. And this court has never hesitated or refused to reverse a decision or judgment of a State court holding that no contract existed, when this court reached the conclusion that there was a valid existing contract.

In Stearns vs. Minnesota, 179 U. S. 223, error to supreme court of Minnesota, the court said on page 233:

> "The doctrine that this court possesses paramount authority, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or non-

existence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous other cases.

On page 232 this court said:

> "The general rule of this court is to accept the construction of a State Constitution placed by the State Supreme Court as conclusive. One exception which has been constantly recognized is when the question of contract is presented. This court has always held that the competency of a state through its legislation to make an alleged contract, and the meaning and validity of such contract, were matters which, in discharging its duty under the Federal Constitution, it must determine for itself."

On pages 253 and 254 Mr. Justice Brown refers to the legality of the contract and says that the contract

> "having been recognized by the legislature and the Supreme Court of Minnesota for thirty years, and also having been recognized as valid in the constitutional amendment of 1871, it is too late to set up its repugnance to the state constitution as against railways which were built upon the faith of its validity."

In Northern Pacific vs. Duluth, 208 U. S. 583, error to supreme court of Minnesota, on page 589-580 the jurisdiction of this court was questioned. The decision last cited was referred to and followed.

In A. C. L. R. R. vs. Goldsboro, 232 U. S. 548, error to Supreme Court North Carolina, an ordinance of a city was complained of as impairing a contract. On page 555 the court stated that the ordinance must be taken as legislation. On page 556 the question is whether a railroad charter was impaired by this ordinance. On that page the court said:

> "When this court has under review the judgment of a state court, * * and the validity of a state law is challenged on the ground that it impairs the obligation of a contract, this court must determine for itself the existence or non-existence of the asserted contract, and whether its obligation has been impaired."

To the same effect are:

Ga. R. R. & Power Co. vs. Town of Decatur, 262 U. S. 432, 438, error to supreme court of Georgia.

Detroit United Ry. vs. Michigan, 242 U. S. 238, error to supreme court of Michigan, page 247, 248.

La. R. & N. Co. vs. New Orleans, 235 U. S. 164, 170, 171, error to supreme court of Louisiana.

St. Paul Gas Light Co. vs. St. Paul, 181 U. S. 142, 147, error to supreme court of Minnesota.

Water Power Co. vs. Street Ry. Co. 172 U. S. 475, 478, error to supreme court of South Carolina.

Douglas vs. Kentucky, 168 U. S. 488, 502, error to court of appeals of Kentucky.

Railroad Commission vs. East Texas R. R. Co., 264 U. S. 79, 86.

When the Act in question was held by the State court to be void because opposed to the **State Constitution,** this court, upon reaching the opposite opinion, has held the act valid under the **State Constitution,** and has reversed the state court.

In Houston & T. C. R. R. Co. vs. Texas, 177 U. S. 66, error to a court of civil appeals of Texas, the court on page 77 said:

> "Thus we see that, although the decision of the state court was based upon the ground that the warrants in which these payments were made had been issued in utter violation of the **state constitution,** and were hence void, and that no payments made with such warrants had any validity, and although this ground of invalidity was arrived at without any reference made to the act of 1870, yet the necessary consequence of the judgment was that effect was thereby given to that act, and

in a manner which the company has always claimed to be illegal and unwarranted by the act when properly construed. The company has never accepted such a construction, but on the contrary has always opposed it, and raises the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below."

In Ohio Life Ins. & Trust Co. vs. Debolt, 16 How. 416, error to the supreme court of Ohio, the court on page 431 said:

"This brings me to the question more immediately before the court: Did the constitution of Ohio authorize its legislature, by contract, to exempt this company from its equal share of the public burdens during the continuance of its charter? The supreme court of Ohio, in the case before us, has decided that it did not. But this charter was granted while the constitution of 1802 was in force; and it is evident that this decision is in conflict with the uniform construction of that constitution during the whole period of its existence.

"And when the constitution of a State, for nearly half a century, has received one uniform and unquestioned construction by all the departments of the government, legislative, executive, and judicial, I think it must be regarded as the true one. It is true that this court always follows the decision of the state courts in the construction of their own constitution and laws. But where those decisions are in conflict, this court must determine between them. And certainly a construction acted on as undisputed for nearly fifty years by every department of the government, and supported by judicial decision, ought to be regarded as sufficient to give to the instrument a fixed and definite meaning. Contracts with the state authorities were made under it. And upon a question as to the validity of such a contract, the court, upon the soundest principles of justice, is bound to adopt the construction it received from the state authorities at the time the contract was made."

II.

A Perpetual Right of Way Was Granted by Such a Contract as Is Entitled to the Protection of the Federal Constitution:

(a) Under the Garst & Bean contract;

(b) Under the charter of the Augusta, Atlanta and Nashville Magnetic Telegraph Company; and

(c) Under the Contract of 1870.

(a)

Garst & Bean Contract of A. D. 1850.

Perpetual Easements Granted by Garst & Bean Contract and by Georgia's Act of 1852.

The Garst & Bean Contract (record, pg. 138) was made by Georgia to procure the construction by Garst & Bean of the telegraph lines along the W. & A. R. R. so as to procure telegraphic service for that railroad. (Mitchell's report, record, pg. 138).

The granting clause is "grant you the use of our right of way for the telegraph company."

Section 6 of the Georgia statute of January 27, 1852, reads: "Be it further enacted that the contract entered into on the 11th day of October, 1850, by William L. Mitchell, Chief Engineer of the Western & Atlantic Railroad and D. W. Garst and J. M. Bean, on the part of said Company, be and the same is hereby ratified and affirmed."

The language of Section 9 of the same Act is "that the A. A. & N. M. T. Co. shall have power and authority to set up their fixtures along and across * * any railroad which now or may hereafter belong to this State."

There is no limit in the contract, or in the statute, to the period of use.

There can be no doubt under the language used in both the contract and the statute that the grant was of a perpetual, irrevocable, assignable easement.

Like language in a grant by a Georgia statute of an easement on this very railroad has been so construed by this court in Georgia vs. Cinn. So. Ry., 248 U. S. 26, 29.

In Sheffield vs. Collier, 3 Ga. 86, the court held similar language to be, "a license to do something which in its own nature seems intended to be permanent and continuing. And it was the fault of the party himself, if he meant to reserve the power of revoking such a license after it was carried into effect, that he did not expressly reserve that right, when he granted the license, or limit it as to duration."

Georgia Code, paragraph 3645, reads:

> "A parol license is primarily revocable at any time, if revocation does no harm to the person to whom it has been granted; but is not revocable when the licensee has executed it and in so doing has incurred expense. In such case it becomes an easement running with the land."

It has been held that this rule applies with greater force to a written grant or license.

Ainslie vs. Eason, 107 Ga. 747, 749.

To the same effect are:

Cook vs. Prigden, 45 Ga. 340.

Brantley vs. Perry, 120 Ga. 760.

Wendham vs. McGuire, 51 Ga. 578.

U. S. vs. B. & O. R. R., 1 Hughes, 145-147.

Louisville vs. Cumberland Tel. Co., 224 U. S. 649, 663, 664.

Owensboro vs. Cumberland Tel. Co. 230 U. S. 58, 65, 66. Quoted above pg.

Essex vs. New England Tel. Co., 239 U. S. 321-322. Quoted above pg.

Validity of Garst & Bean Contract.

The contract of 1850 with Garst & Bean is valid for the reasons stated in ground 3 of the petition for rehearing in the supreme court of Georgia (record, pg. 543.)

The Georgia Act of December 21, 1836 (record, pg. 199, particularly Sec. 3, record, pg. 200) authorizes the Superintendent with the advice of the Engineer to contract for the construction of the railroad.

The Georgia Statute of December 23, 1837 (Sec. 2, record, pg. 202), appoints commissioners for the general superintendence of the construction of the railroad, &c.

The Georgia Statute of December 4, 1841 (Sec. 2 and 3, record, pg. 206), does away with the com-

missioners above mentioned and gives the powers previously exercised by them to a Chief Engineer and disbursing agent.

The Georgia Statute of December 22, 1843 (Sec. 2, record, pg. 207), vested the powers previously given to Commissioners, or the Governor or the Chief Engineer and disbursing agent, in "the Governor and Chief Engineer of said road." Sec. 3 of the same Statute charged the Chief Engineer with the duty of completing the railroad.

The Garst & Bean contract was signed by the Chief Engineer (record, pg. 139).

It was reported to the Governor of Georgia record, pg. 280).

In a very similar case it was held that the assent of the Governor was to be presumed.

U. S. vs. B. & O. R. R., 1 Hughes, 138, 144.

Wilcox vs. Jackson, 13 Pet. 498.

It is certain that the Governor of Georgia approved that contract because the ratifying Georgia Act of January 27, 1852, (record, pg. 280) was approved by the Governor of Georgia January 27, 1852.

When the Garst & Bean contract was made the Chief Engineer was acting under the Georgia Statute of December 22, 1843.

The report of the Chief Engineer, as well as the testimony of MacDonald (record, pgs. 138, 235-237) shows that it was imperatively necessary that the service of a line of telegraph be obtained for the successful, safe and economical operation of the railroad.

There can be no doubt but that the State and its railroad have received great benefit, service and value from this telegraph line, and from its owners.

The objection that the easement is uncertain and not definite is untenable. While the location of the line of telegraph is not definitely and minutely fixed in either the contract or the ratifying act, it became fixed and definite upon construction of the telegraph line.

L. & N. R. R. Co. vs. W. U. T. Co., 250 U. S. 363 (h. n. 4), 366.

U. S. vs. So. Pac. R. R. Co., 146 U. S. 570 (h. n. 2) 583-595.

U. S. vs. Detroit L. Co., 200 U. S. 321, 331, 334.

In 3 Washburn on Real Property, Section 2333, it is stated that a grant of land without describing boundaries is made good and valid when the grantee takes possession, and that when "grantee takes possession of it, it ascertains the grant and gives effect to the deeds."

(b)

Georgia statute of January 27, 1852, incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Co.

Section 6 of the Statute of January 27, 1852, incorporating the A. A. & N. M. T. Co., expressly ratifies the contract with Garst & Bean.

Section 9 of that Act grants the created corporation perpetual easements for telegraph lines independently of the Garst & Bean contract.

Constitutionality of act of 1852.

The validity of these sections 6 and 9 of the Statute of 1852, ratifying the Garst & Bean contract and granting independently thereof perpetual easements, depends, in the opinion of the supreme court of Georgia, on the construction and effect of the provision of the then existing Georgia constitution, to wit:

> "Nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof."
>
> Georgia Constitution of 1798, Art. 1, Sec. 17.

The title of the Act is

> "An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Co."

On this question the Justices are evenly divided. Each set of Justices has rendered an opinion, each of exactly opposite import.

The decision of Justice Russell, holding Sections 6 and 9 of the Statute unconstitutional, does not refer to any decision of the Supreme Court of Georgia.

Prior Georgia decisions upholding constitutionality of act of 1852.

In the decision of Justice Custer, and in ground 1 of the petition for rehearing in the Supreme Court of Georgia, it is claimed that, under former unanimous unreversed quoted decisions of the Supreme Court of Georgia, Sections 6 and 9 of the Statute of 1852 are constitutional; that thereby the contract with Garst & Bean was lawfully ratified, and that a lawful grant of perpetual easements was by that statute made to the A. A. & N. M. T. Co.

The Georgia decisions there cited and relied upon are

Goldsmith vs. Rome R. R. Co., 62 Ga. 473; quoted in record, pgs. 537-540; 534-535.

Davis vs. Bank of Fulton, 31 Ga. 69, quoted in record, pg. 540.

Goldsmith vs. A. & S. R. R. Co., 62 Ga. 468.

Hope vs. Mayor, 72 Ga. 246, quoted in record, pg. 549.

The above cases were decided prior to 1885.

Bonner vs. Milledgeville Ry. Co., 123 Ga. 115; quoted in record, pg. 540. (Decided 1905).

See also

Howell vs. State, 71 Ga. 224 (1873).

Plumb vs. Christie, 103 Ga. 686 h. n. 8, 700 (1898).

Wellborne vs. State, 114 Ga. 793 h. n. 5, 6, 820 (1902).

Farkas vs. Smith, 147 Ga. 503, 511-512 (1918).

Lloyd vs. Richardson, 158 Ga. 633 (July 3, 1924). See particularly pg. 635-637 reviewing prior decisions.

Prior decisions control.

The Georgia law is that the foregoing decisions stand until set aside in the manner provided by law, and until then have the force and effect of a statute.

A statute of Georgia approved December 9, 1858, Georgia Laws 1858, pg. 74, reads:

"An Act to make uniform the decisions of the Supreme Court of this State; to regulate the reversals of the same, and for other purposes.

"1. Section 1. Be it enacted, That from and after the passage of this act the decisions of the Supreme Court of this State, which may have been heretofore, or which may hereafter be made by a full court, and in which all three of the Judges have or may concur, shall not be reversed, overruled or changed; but the same is hereby declared to be, and shall be considered, regarded and observed by all the courts of this State, as the law of this State, when it has not been changed by legislative enactment, as fully, and to have the same effect, as if the same had been enacted in terms by the General Assembly.

"2. Sec. 11. Repeals conflicting laws. Approved December 9, 1858."

Section 210 of the Georgia Code of 1863, adopted by the Legislature and having the force of a statute, provides:

"Sec. 210. A decision concurred in by three Judges cannot be reversed or materially changed, except by a full bench, and then after argument had, in which the decision by permission of the Court is expressly questioned and reviewed, and after such argument the Court in its decisions shall state distinctly whether it affirms, reverses or changes such decision."

This provision, without change, appears in each of the four subsequent Codes—of 1868, Sec. 204;

of 1873, Sec. 217; of 1882, Sec. 217; of 1895, Sec. 5588.

From the organization of the Supreme Court of Georgia until 1897 there were three Justices of that Court. By constitutional amendment ratified in 1896 the Justices of that Court were, from January 1, 1897, increased to six, the present number.

A statute of Georgia approved December 17, 1896, Georgia Laws 1896, pg. 42, provides:

> "Sec. 3. * * In all cases decided by a full bench of six justices, the concurrence of a majority shall be essential to a judgment of reversal, and if the justices are evenly divided, the judgment of the court below shall stand affirmed."
>
> "Sec. 5. Be it further enacted, That the law now embodied in section 217 of the Code of 1882, which declares that a decision concurred in by three judges cannot be reversed or materially changed, except by a full bench, be, and the same is, hereby amended by striking therefrom the words just quoted, and inserting in their stead the following words, to wit: 'a decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges, or justices, cannot be reversed or materially changed except by the concurrence of at least five jus-

tices.' Unanimous decisions hereafter rendered by a full bench of six justices shall not be overruled or materially modified except in the manner pointed out in said section, and then only with the concurrence of six justices."

Sections 6207 and 6208 of the Georgia Code of 1911, the present Code, read:

"6207. Decision of, how reversed. A decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges, or Justices, can not be reversed or materially changed except by the concurrence of at least five Justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six Justices, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument, the court in its decision shall state distinctly whether it affirms, reverses, or changes such decision."

"6208. Rule when the judges differ. If the court is not unanimous in its decisions, the judges shall deliver the opinions seriatim, but they shall not be required to write them out. The opinion of the majority shall decide each question. If but two judges preside, and they are divided in opinion, the cause shall be re-

> argued before the remaining judge with a full bench, before the term closes, if possible. If not possible, the judgment of the court below shall stand affirmed, upon the certificate of the fact of the division of the court, unless the judge is absent from providential cause, in which event the cause shall stand continued."

Not only have the prior decisions above cited not been overruled or reversed, but there was no permission granted by the court to question or review them, nor was application therefor made.

In Heard vs. Russell, 59 Ga. 25, the court said on page 54:

> "The decision complained of and inveighed against is a unanimous judgment, and until deliberately reviewed and overruled, it is as binding as an act of the Legislature." (Referring to Georgia Code Sec. 217).

In Fidelity & Deposit Co. vs. Nisbet, 119 Ga. 316, the court said on page 325:

> "When this Court has by a unanimous decision decided the legal result of a given state of facts, it has established a precedent which, until the decision is reviewed and overruled, is bound to control any subsequent case in which the same question is presented on the same state of facts."

The certificate of even division of the Justices of the Supreme Court of Georgia, and the judg-

ment of that Court, appears on page 521 of the record.

Judgment by even division of Justices not binding on this court.

This court is not bound by the decision of Justice Russell, concurred in by two other Justices, nor by the judgment of the Supreme Court of Georgia affirming the judgment of the lower court upon equal division of its six Justices for the following reasons:

(1) The rule of construction binding on this court is that expressed in the earlier unanimous decisions of a full bench of the Georgia Supreme court prior to 1897 (decisions above cited in 31 Ga., 62 Ga., 72 Ga.), of five Justices in 1905 (one Justice being absent, 123 Ga. 115), and of six Justices in 1918 (147 Ga. 503, 512), and in 1924 (158 Ga. 633).

The opinion of Russell, C. J., is in conflict with each of these earlier decisions. The opinion of Custer, J., cites and follows them.

Neither the supreme court of Georgia, nor any court of that State, is bound by the opinion of Russell, C. J., but the law of Georgia requires all of its courts to follow the earlier decisions of its Supreme Court notwithstanding the opinion of Russell, C. J., and two associate Justices concurring, to the contrary.

In Citizens Bank vs. Fort, 142 Ga. 611, the court says:

> "(a) That was a unanimous decision rendered when the court was composed of three Justices. In order to reverse it the concurrence of five Justices of the present bench is necessary (Civil Code (1910), Sec. 6207). That number do not concur in reversing it, and it stands as the decision of this court."

In Warner vs. Strickland, 144 Ga. 547, the court says:

> "(b) The decision in the case cited above was concurred in by the entire bench of six Justices. If there is any conflict between that and the ruling made in the later case of Albright-Pryor Co. v. Pacific Selling Co., 126 Ga. 498 (4), 501 (55 S. E. 251, 115 Am. St. R. 108), decided by five Justices, the ruling in the latter case must yield to that in the former."

In Josey vs. The State, 148 Ga. 468, the court says:

> "(b) The decision in Rainy v. State, 100 Ga. 82 (27 S. E. 709), decided by three Justices on November 9, 1896, wherein a ruling was made contrary to the doctrine announced and followed in the prior decisions of this Court above cited, must, under the doctrine of stare decisis in force in this State (Civil Code Sec. 6207), yield to such former decisions."

In Bailey vs. McAlpin, 122 Ga. 616, the court says in h. n. 7:

> "7. The ruling in Henderson v. Levy, 52 Ga. 35, being concurred in by only two Judges, and the decision in Richardson v. Whitworth, 103 Ga. 741, being concurred in by only five Justices, are not controlling, and will not be followed, as they are in conflict with the ruling in Morgan v. West, 43 Ga. 275, which was a decision by three Judges."

Of similar import are:

McWhorter vs. Ford, 142 Ga. 554, h. n. 5.

Penn. vs. Thurman, 144 Ga. 67, 68 h. n. 7.

Holmes vs. Sou. Ry. 145 Ga. 172, h. n. 1.

Shaw vs. State, 60 Ga. 247, 254.

(2) The earlier decisions cited above, and in the opinion of Custer, J., have not been, as the statute preemptorily requires, "expressly questioned and reviewed" "by permission of this (Georgia supreme) court"; nor has this been sought by this defendant in error.

(3) The earlier decisions cited and followed by Custer, J., and the two Justices concurring with him, have not been reversed or changed by the supreme court of Georgia. To reverse or change them the statute requires, as above shown, the concurrence of five Justices as to unanimous decisions rendered prior to 1897, and the concurrence

of six Justices as to decisions rendered after January 1, 1897.

(4) These earlier unreversed decisions of the supreme court of Georgia bind this court, notwithstanding the decision of Justice Russell concurred in by two associate Justices, and the judgment of the supreme court of Georgia upon equal division of its Justices.

Section 721 of U. S. Rev. Stat. provides that "the laws of the several states * * shall be regarded as rules of decision * * in the courts of the United States."

"It has been held * * that the decisions of the highest court of a state in regard to the validity or meaning of the Constitution of that state or its statute, are to be considered as the law of that state within the requirement of that section."

Bucher vs. Cheshire, R. R., 125 U. S. 555, 582-3.

Wade vs. Travis Co., 174 U. S. 499, 508.

(5) The decisions of a state court binding the such decisions of the state court of last resort as Supreme Court of the United States are limited to are settled and as constitute a settled construction. Oscillating decisions are not controlling. The even division of the Justices in this case is not a settled construction. It oscillates from the earlier controlling decisions.

Etheridge vs. Sperry, 139 U. S. 274, 276. "Settled law * * as established by decisions of its highest courts." "Settled construction * * of the highest court."

Muhlker vs. N. Y. H. R. R. 197 U. S. 545, h. n. 4,

> "This court determines for itself whether there is an existing contract, * * where there is a diversity of state decisions, the first in time may constitute the obligation of the contract and the measure of rights under it."

The point is also involved in the following cases, which however originated in Federal courts:

McKeen vs. Delancey's Lessee, 5 Cr. 33, "construction was universally received."

Polk's Lessee vs. Wendal, 9 Cr. 98, "where that construction is settled."

Elmendorf vs. Taylor, 10 Wh. 160, 165, "settled." "Conflicting opinions." "Uniformly decided." "Settled finally."

Jackson vs. Chew, 12 Wh. 162, 167, 168, "Settled." "At rest there." "Highest court." "Settled rules." "Settled course of adjudications."

Greene vs. Neals, 6 Pet. 295, 297, 298, 299, "Settled construction." "A fixed and received construction. * * Makes a part of such statutes

law." "Highest judicial tribunal." "A fixed rule of property."

Pease vs. Peck, 18 How. 598, 599, "Settled construction of the laws of a state by its highest judicature." "When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions." "Such decisions have not the character of established precedent declaratory of a settled law of a state."

Gelpcke vs. Dubuque, 1 Wall. 205, 206, "Settled adjudications." "The earlier decisions, we think, are settled by reason and authority." "The sound and true rule is, that if the contract, when made, was valid by the laws of the state, as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decisions of its courts altering the construction of the law."

Burgess vs. Seligman, 107 U. S. 33, "Established rules." "Where the law has not been thus settled it is the right and duty of the Federal courts to exercise their own judgment." "When contracts and transactions have been entered into, and rights have accrued thereon under the particular state of the decisions, and of the state tribunals the Fed-

eral courts properly claim the right to adopt their own interpretation of the law applicable to the case, although different interpretations may be adopted by the state courts after such rights have accrued."

6. The decision of a supreme court of a state at variance with earlier decisions under which rights have accrued need not be followed. Vested rights should not be so destroyed.

In Georgia R. R. vs. Ivey, 73 Ga. 499, it was sought to review a prior decision. The supreme court on page 501-502 said:

"It did not fail to strike such counsel that a principle decided nine years ago, and recognized so long as law in subsequent opinions of a bench changing in its personnel, too, as ours does so often, was planted so long and had taken root so deeply in our Georgia jurisprudence as to render it aged, if not venerable, and that possibly the principle stare decisis would so encrust the trunk as to make it impervious to any axe, however heavy and sharp, though wielded with muscles however strong and trained. It was, therefore, argued that no property had passed, and no rights been vested under this decision, and, therefore, that the weight of the doctrine of stare decisis did not bear on the case reversed. It is our opinion that the doctrine is as applicable here as in other cases. A construction of a statute * *

was given in that case by a unanimous bench, and became settled law; it entered into every contract between master and servant; it fixed the liability of the master," etc.

In Almand vs. Almand, 95 Ga. 204, the court on page 206 stated that prior unreversed decisions constitute the law, and on page 207 said:

"Aside from these considerations, there is another cogent reason why the principle of these decisions should not be disturbed. It became many years ago engrafted upon and is now deeply embedded in the jurisprudence of this State. The courts have uniformly administered the law with reference to it. Important property rights have grown up under it; and to justify the court now to set aside such a uniform current of decisions, it should be satisfied by the most convincing logic that the principle is itself unsound, and as well vicious in its effect. The doctrine of stare decisis is a conservative one. Its application is essential to the permanence of a well ordered system of jurisprudence. It gives the public confidence in the stability of the law, and, even in doubtful cases, it is of infinitely greater importance to public as well as private interests that the law should be definitely settled, affording a fixed rule of conduct, than that it be settled in a particular way."

To the same effect see Gelpcke vs. Dubuque, 1 Wall. 205; Burgess vs. Seligman, 107 U. S. 33; Muhlker vs. N. Y. & N. H. R. R. Co., 197 U. S. 545, cited above.

7. The judgment of the supreme court of Georgia, only by division of its Justices, affirms the judgment of the lower court. The judgment of that lower court, even though it has become final, does not bind this court.

Beals vs. Hale, 4 How. 21, 54.
In Re F. & D. Co., 256 Fed. 73, 76.

See also decisions above cited to the effect that only the decision of the court of last resort control.

Decisions of this court similar to Georgia's prior decisions.

The Georgia decisions above cited, establishing the rule that Sections 6 and 9 of the Georgia Act of 1852 (incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company) is not matter different from what is expressed in the title of that act, are in full accord with the decisions of this court.

Montclair vs. Ramsdell, 107 U. S. 147, 155, is of the same tenor as the Georgia cases cited and is provingly quoted and followed in Hope vs. Mayor, 72 Ga. 246, 250. (Quoted in the record, pg. 549).

Of like import are:

Detroit vs. Detroit Ry., 184 U. S. 368, 391-392;

Blair vs. Chicago, 201 U. S. 400, 451.

These decisions, both of the supreme court of Georgia and of this court, fully sustain the decision of Justice Custer and the two Justices concurring with him.

Sections 6 and 9 of the act of 1852 are not matters different from what is expressed in the title.

The title of the Act is "An Act to incorporate the A. A. & N. M. T. Co."

In Goldsmith vs. Rome R. R. Co., 62 Ga., followed by Justice Custer, (record, pg. 534) it is stated "the charter of a private corporation is a contract as between the State and the corporation, and the stipulations, terms and conditions of a contract are to be looked for in the body of the instrument and not in the title or caption."

The same decision quoted by Justice Custer, (record, pg. 535) says: "What do we mean by 'an Act to incorporate' a railroad company? Suppose a bill to be entitled 'An Act to incorporate the Rome Railroad Company' should be offered in the legislature, what would the legislators present understand such a bill to be? What would they think was intended by it? What is expressed in the

title of that sort of bill? In legal parlance, it means that the author of the bill proposes to make an artificial person, or to create a corporation for the purpose of constructing and operating a railroad, and to clothe it with such attributes and powers, and impose upon it such duties and liabilities, and to grant it such privileges and immunities, as in the judgment of the legislature will be necessary or proper, or appropriate for such enterprise. The very nature of a corporation indicates that such is a correct view of the objects and scope of an act of incorporation."

Justice Custer, on page 535, after quoting the above decision, says:

"Under the views here expressed, the court below erred in striking, upon motion of the plaintiffs, the part of the defendant's answer which set up the grant of an easement along the Western & Atlantic Railroad by express contract, subsequently ratified by the legislature."

On page 534 Justice Custer says:

"Can it be doubted that under that title (of the Act of 1852) it was competent for the legislature to make * * provisions for authority to connect with other lines, and provide that it might run along or across highways * * *"

"Section 6 of the Act declares that a certain contract shall be ratified, and that is the very contract that made the existence of the company most

feasible and possible, and the plan for bringing into existence the telegraph line feasible."

Section 9 of the Act of 1852 grants to the corporation thereby incorporated easements without limit along any railroad owned, then or subsequently, by Georgia. The W. & A. R. R., then in existence and in operation, was then owned by Georgia.

Clearly a telegraph company could neither be constructed nor operated without easements in land for the maintenance of its lines. A provision in the incorporating act for such easements is not matter different from what is contained in the title. Moreover the title indicates that the legislative purpose was to create a quasi public corporation not merely for the private gain of the incorporators, but also for the public benefit and welfare. The title indicates that the line of telegraph would be established between Atlanta & Nashville. Geographical conditions, well known to the public and to the legislature, necessarily indicated that the line would run from Atlanta to Chattanooga in piercing the Blue Ridge mountains to reach Nashville, named in the charter. The W. & A. R. R. was the then great highway of that route.

The very next act in the Georgia laws of 1851-1852 incorporating the Rome Branch Magnetic Telegraph Company, Sec. 8, page 199, provides "that the Rome Branch Magnetic Telegraph Com-

pany shall have power and authority to set up their fixtures along the railroad." The Act of 1847 printed in the record, pg. 452, "to authorize the construction of the Magnetic Telegraph Co." provides "that any company or individual may erect posts and wires and other fixtures for telegraph purposes on, or by the side of any road, or highway in this State." Clearly then, at the time of the passage of the act incorporating the A. A. & N. M. T. Co., it was the well known policy of Georgia to permit the construction of telegraph lines along railroads and highways as a matter of public policy for the public welfare.

In Louisville vs. Cumberland Tel. Co., 224 U. S. 649, it is stated, page 650, that in 1886 the Legislature of Kentucky chartered the O. V. Tel. Co. without limiting its corporate existence and authorized it "to purchase or acquire and dispose of real estate * * rights and franchises relating to such business," and granted it the power to "construct, equip and maintain said telephone systems and exchanges, erect poles and string wires thereon, and operate its telephone lines over, along, or under any highway, street or alley of the City of Louisville with and by the consent * * of said City." An ordinance of the City Council in 1866 ratified that legislative grant. Under the then constitution the legislature was not required to provide that its grant should be subject to the assent of the city. (page 658).

This court, page 661, stated that among the franchises given the telephone company by its charter was "the right to use the streets in the city for the purpose necessary in conducting a telephone business. Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but, howsoever designated, it is property—being property it was taxable, alienable and transferable."

And on page 663: "In considering the duration of such a franchise **it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures.** These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, **would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use.** For manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

"This grant was not at will, nor for years, nor for the life of the city. Neither was it made ter-

minable upon the happening of a future event, but **it was a necessary and integral part of** the other franchises conferred upon the company, all of which were perpetual and **none of which could be exercised without this essential right to use the streets.** The duration of the public business in which these permanent structures were to be used, * * * compel a holding that the State of Kentucky conferred upon the Ohio Valley Telephone Company the right to use the streets to the extent and for the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the City of Louisville. Such has been the uniform holding of courts construing similar grants to like corporations."

Clearly the provisions of Sections 6 and 9 of the Act of 1852 incorporating the A. A. & N. M. T. Co. are emphatically germane to the title of the act and do not constitute "matter different from what is expressed in the title."

Action and construction by executive and legislative departments upholding validity of act of 1852.

The interpretation upholding the validity of Sections 6 and 9 of the Act of 1852, and upholding the validity of the contract of 1870, is supported by the acquiescence of the various departments of Georgia in the construction and maintenance of these telegraph lines under the Garst & Bean contract in the year 1850 or 1851; under the ratifying

act of 1852; under the contract of August 18, 1870; by their acquiescence in the use of necessary easements by the grantees under those contracts; and by their acquiescence in the operation of those lines with continuously accruing benefit to the State of Georgia. Such collateral interpretation is entitled to great weight even when a statute is assailed on the ground of unconstitutionality.

In Howell vs. State, 71 Ga., 224, an act was attacked upon the ground that the act contained matter different from what is expressed in the title thereof, the identical constitutional provision invoked by Georgia and its lessee in respect to the Georgia Statute of 1852. In considering this question the court said, on page 229:

> "The practice of the various departments of the government, as a means of collateral interpretations, is not to be rejected by the courts, in passing upon the constitutionality of a law. It is entitled to consideration and weight, especially in view of another settled rule, that a law is not to be set aside unless its conflict with the provisions of the constitution is plain and obvious. Wellborn vs. Estes, 70 Ga. 390."

In Wellborne vs. Estes, 70 Ga. 390, the court, in considering a claimed unconstitutionality of a Georgia statute, said on page 396:

> "In determining questions of such moment and delicacy as those here presented, we feel

bound to proceed with great caution, and not to set aside the action of a co-ordinate department of the government, except where the conflict between that action and the fundamental law is clear and palpable. It must be so apparent as to leave no reasonable doubt as to its existence upon the judicial mind."

The case of U. S. vs. B. & O. R. R. Co., 1 Hughes 138, is, in many respects, similar to the case now before this court. A grant by the Secretary of War was questioned.

On page 143 the court said:

"The government having in all its branches acquiesced in this action of the War Department, she should not be permitted to change her position with reference to this property, but her rights should be determined according to the construction heretofore given the act, which seems to me not only to be warranted by its terms, but does no violence to the language employed to express its object."

On page 145 the court said:

"The license granted was for an indefinite period, no time being fixed when the permission to use the lands for the purpose specified in the agreement was to terminate. Up to this time it has never been revoked, nor has any notice been given by the government of its intention or even its desire to revoke it, until the institution of this suit.

"The defendant accepted this license upon the terms indicated. It built and constructed its railroad under this authority. It was the extension of a great national highway, and as we now know, second to none in magnitude and importance in this or any other country. It must have been apparent to both the contracting parties that an enterprise at that time so stupendous in its character as the construction of a railroad from Baltimore to the Ohio River, was to be permanent and lasting. A right thus acquired, under a written license not specially restricted, is commensurate with the thing of which the license is an accessory.
* * *

"The inference is clear to my mind that it was the intention of the Secretary of War to dedicate the property granted under this license to this specific use, which was a public one. It was for a great national highway. Having so donated and declared the purposes and object of the donation, it became dedicated to the specific purposes indicated."

On page 146 the court said:

"By this act upon the part of the United States, through their agent, the defendant, as well as the public through it, has acquired an easement in the property, so long as it continues to use it for the purposes granted, which is said 'to be a liberty, privilege, or ad-

vantage which one may have in the lands of another without profit.' The owner of the fee, whoever he may be, can not revoke the license granted. The fee will remain in the original owner, or his grantees, but the right of the defendant to the use is paramount to the title of the owner of the fee, and does not require the fee for its protection. * *

"The plaintiffs were influenced in granting the license by the benefits to be derived from the construction of the road in furnishing them with better facilities of transportation at reduced rates. * *

"It is here that equity interposes her power to estop the complainant from disturbing the defendant in the rights acquired by it under the agreement, otherwise it would have no remedy. It is now the settled doctrine that 'equity will execute every agreement, for the breach of which damages may be recovered, when an action for damages would be an inadequate remedy.' In this case no adequate compensation could be made the defendant for the damages it would sustain by the revocation of its license and the loss of rights acquired under it. The complainant having without objection permitted the defendant to construct over their lands a public railroad, 'cannot, after the road is completed, or large expenditures have been made thereon, upon

the faith of their apparent acquiescence, reclaim the land or enjoin its use by the railroad company.' Goodwin v. Cincinnati and Whitewater Canal Company, 18 Ohio St. 169; Cumberland Valley Railroad Company v. McLanahan, 59 Penn., 24, 31. And this doctrine is reaffirmed in 21 Ohio, 553, in which case the learned court declare that 'it is the dictate of natural justice that he who, having a right or interest, by his conduct influences another to act on the faith of its non-existence or that it will not be asserted, shall not be allowed afterwards to maintain it to his prejudice.' Out of this principle has grown the equitable doctrine of estoppel in pais, so well stated and strongly approved by Fonblanque in his Treatise on Equity, vol. I, chap. 3, sec. 4; by Chancellor Kent in Wendell v. Van Rensselaer, 1 Johns. Ch., 344; by Lord Macclesfield in the leading case of Savage v. Foster, 9 Modern R., 35.

"In the case under consideration, no one can question the fact that the defendant was influenced in the course it pursued by the conduct of the government through its officer, the Secretary of War. The Company entered upon the premises under its agreement with the government, and remained in the peaceable posssesion and the quiet enjoyment of them for a period of upwards of thirty years. During all this time not the slightest intima-

tion was ever given to it of any claim whatever upon the part of the government to the disputed premises. I therefore conclude that, upon every principle, both legal and equitable, the complainants cannot and ought not to be permitted at this late day to disturb the defendant in the possession of the premises under the agreement of 1838."

In the following cases the rule of collateral interpretation announced in 71 Ga. 224, above cited, is followed:

Stuart vs. Laird, 1 Cranch 299, h. n. 3, page 309.

U. S. vs. Philbrick, 120 U. S. 52, 59.

U. S. vs. Alabama, G. S. R. R. Co., 142 U. S. 615, 621.

U. S. vs. Johnson, 124 U. S. 253.

Roberts vs. Downing, 127 U. S. 607, 613.

U. S. vs. Hermonos, 209 U. S. 337, 339.

Johnson vs. Towsley, 13 Wall. 72.

In U. S. S. vs. Des Moines Navigation Co., 142 U. S. 510, in which a grant by the United States was attacked, the court in the last headnote said:

"The knowledge and good faith of the legislature are not open to question, but the presumption is conclusive that it acted with full knowledge and in good faith."

On page 545-546 the court stated the necessity of imputing to the legislature knowledge of conditions then existing and the undesirability of courts probing into matters and conditions then existing.

In Winter vs. Jones, 10 Ga. 190, this court said on page 206:

> "(16) It is true that every presumption is in favor of a grant. That every prerequisite has been performed, is an inference properly deducible from the fact that it is the act of the highest officer of the State, and performed in the execution of a function prescribed by law, and requiring the exercise of judgment and discretion. It would, therefore, be extremely unreasonable, to void a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a grant."

Of like import is Tameling vs. U. S. Co., 93 U. S. 644; Maxwell Land Grant Case, 121 U. S. 325, 369, 374, 379, 397.

In Owensboro vs. Cumberland Tel. Co., 230 U. S. 58, the court said on pages 65-66:

> "The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for

> the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself or as a consequence of some limitation imposed by the general law of the State, or by the corporate powers of the city making the grant. * * If there be authority to make the grant and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights."

In Essex vs. New England Telegraph Co., 239 U. S. 321-2, the Court, speaking of the telegraph lines and easements, said:

> "With full knowledge of all circumstances, the town authorities permitted the location and construction of lines along the highways, and for more than twenty years acquiesced in their maintenance and operation. The company has expended large sums of money and

perfected a great instrumentality of interstate and foreign commerce, in the continued operation of which both the general public and the Government have an important interest. Under similar circumstances it has been determined, upon broad principles of equity, that an owner of land, occupied by a railroad without his previous consent, will be regarded as having acquiesced therein and be estopped from maintaining either trespass or ejectment * * ; and like reasons may demand similar protection to the possession of a telegraph company. A municipal corporation, under exceptional circumstances, may be held to have waived its rights or to have estopped itself. * *

"The streets and highways of Essex are undoubtedly post roads within the meaning of the Act of 1866. * * What rights,—if any,—in respect to them were immediately secured by the telegraph company through acceptance of that Act, we need not consider. It entered upon those now occupied notoriously, peacefully and without objection and has developed there a necessary means of communication. The statute must be construed and applied in recognition of existing conditions and with a view to effectuate the purposes for which it was enacted. Among the latter, * * are the extension and protection of instrumentalities essential to commercial intercourse and the efficient conduct of governmental affairs. In the

circumstances, appellee has acquired the same Federal right to maintain and operate its poles and wires along the ways in question that would have attached had the selectmen granted a formal antecedent permit. Commercial transactions and the orderly conduct of governmental business have come to depend on the daily use of these lines and certainly would be as seriously hindered by their severance as if they had been constructed after an official location. There is no suggestion that ordinary travel is being interfered with; and, having long acquiesced in appellee's peaceful possession, the town may not now rely upon the claim that this was obtained without compliance with prescribed regulations and treat the company as a naked trespasser. Its rights under the Federal law would be violated by the threatened arbitrary interference."

Title of Garst & Bean and of Augusta, Atlanta & Nashville Magnetic Telegraph Company to easements transmitted to Western Union Telegraph Co.

There can be no question that any easements acquired under the Garst & Bean contract of 1850 and under the Act of 1852 incorporating the A. A. & N. M. T. Co. have been transmitted to, and are now possessed by, the Western Union Telegraph Company.

Justice Custer and the two Justices concurring with him so find. (Record, pg. 536):

> "Defendant showed a right to the easement contested, by grant; that is, under the contract between Mitchell and Garst & Bean, as affirmed and ratified by the General Assembly. * * The transmission of this title through successive conveyances to this defendant could be shown in a way indicated in defendant's answer; * * and * * in view of those facts and circumstances pleaded, as well as the documents introduced, * * the jury would have been authorized to find against the State. * * If in any case a grant should be presumed, it should be presumed in favor of this defendant under the facts alleged and proved in this record." See full quotation, pg. 9 above.

This accords with the decisions upon this point, and particularly Fletcher v. Fuller, 120 U. S. 534, 544; Wilson v. Snow, 228 U. S. 217, United States v. Chaves, 159 U. S. 452, 464, and United States v. Devereux, 90 Fed. Rep. 182 (4 C. C. A.), 187-8.

Acceptance of charter of A. A. & N. M. T. Co.

It has been claimed that the grant under the Act of 1852 incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company is invalid because the acceptance of that charter has not been shown.

It is true that there is no corporate action proven accepting the charter, but in Atlanta vs.

Gate City G. L. Co., 71 Ga. 106, it was held in h. n. l, "if a charter is granted after having been applied for, acceptance may be presumed from such previous application." See also body of decision, pg. 117.

That decision related to a legislative charter, pg. 108, like the charter granted by the Act of 1852.

Acceptance is also to be presumed from the mortgages made by A. A. & N. M. T. Co. (Exhibits 15, 16, 17, record, pgs. 139-144); from the execution issued against the A. A. & N. M. T. Co. by Georgia courts, the levy by the Sheriff of Richmond County, Ga., on property of the A. A. & N. M. T. Co., his advertisement of sale (record, pg. 408), and the deeds of Georgia's Sheriffs so reciting and conveying property of that Company (Exhibit 18, 19, record, pg. 145, 146); from the record of the suits of Mills and of Coffin against the A. A. & N. M. T. Co. (Ex. Q, Q 2 and R, record, pg. 466, 473, 474), in each of which there was an appearance by the A. A. & N. M. T. Co., as defendant; in the former verdict and judgment was rendered against the A. A. & N. M. T. Co. These suits were brought in Fulton Superior Court in 1856 and in 1860. The first suit was by Mills, the former general agent and president of the A. A. & N. M. T. Co., for money advanced to the A. A. & N. M. T. Co. and for his salary for services performed, alleging that Mills was appointed general agent pursuant to the corporation's charter. The

last suit is for damages for failure of the A. A. & N. M. T. Co. to transmit messages in 1858 over its lines.

All of these documents, though excluded, were fully proved. This is shown by the recitals of the motion for new trial, paragraphs 36-41, record, pgs. 404-405; paragraph 49, record, pg. 407. The court has certified that the recitals in the motion for new trial are true. (Record, pg. 514.)

The acceptance of the charter is also to be presumed from recitals in the original deed from Hammett of 1858 and then recorded in the County records of five Georgia Counties conveying "the telegraph line from the City of Atlanta * * to the line dividing the said State of Georgia from the State of Tennessee * * situated and located immediately along the line of the Western & Atlantic Railroad, a distance of 120 miles more or less * * known as the Augusta, Atlanta & Nashville Telegraph Company line," (Ex. 3, record, pg. 110, 286; Ex. J., record, pg. 455); from similar language in another deed of 1859 from Wylly then recorded in Hamilton County, Tenn., conveying the same telegraph line from the Tennessee line to Chattanooga (Ex. 4, record, pg. 111; Ex. 5, record, pg. 456); and from a deed containing similar language conveying the entire telegraph line of the A. A. & N. M. T. Co., from Atlanta to Chattanooga to the American Telegraph Co. (Ex. 5, record, pg. 112). To the same effect is the language in Exhibit 2, record, pg.

109. These deeds (Exhibits 2 to 5 inclusive) each bear date A. D. 1858 or 1859. All were proved by the testimony of Atkins and of Burleigh, custodians of the records of the Western Union Telegraph Company, produced on the trial (record, pgs. 283, 408).

The American Telegraph Co. on July 12, 1866, conveyed all of its telegraph lines to the Western Union (record, pg. 460-466).

That each of these documents, though excluded as evidence, was fully proved is shown by statements in the motion for new trial, paragraphs 42-45, record, pg. 405-406; certified to be true (record, pg. 514).

From these facts the law presumes acceptance of the charter and corporate existence. 14 C. J., pgs. 172-173.

Besides this Stephens and Terrell proved the existence of this line in 1858 and in 1859 (record, pgs. 290, 291).

The presumption is that these lines of telegraph originally established about 1850 have never been abandoned. The burden to prove abandonment is on the plaintiffs, and they must make this proof by clear, unequivocal and convincing testimony.

A. B. & A. Ry. Co. vs. Coffee County, 152 Ga. 432, 436.

Gaston vs. Gainsville Ry. Co., 120 Ga. 516. pg. 518, par. 2.

Brunswick R. R. vs. Waycross, 91 Ga. 573, 575.

Mere proof of possession in the Western Union Telegraph Company raises the presumption that it in some way acquired valid title to that which it occupies.

(c)

Contract of 1870.

The contract of 1870 made by Foster Blodgett, superintendent of the Western & Atlantic Railroad, and by Rufus B. Bulloch, Governor of Georgia, is fully set out in the record, pgs. 116-119. The preamble recites "That in order to provide necessary telegraph facilities for the party of the second part, (W. & A. R. R.), and to a better understanding of the terms on which the party of the first part, (W. U. T. Co.), shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto, it is mutually contracted and agreed in consideration of the respective obligations herein assumed as follows, to wit:" * *

Then follows a statement of what the Western Union Telegraph Company covenants to do; followed by covenants of the State of Georgia includ-

ing the following: "Western Union Telegraph Company shall have perpetual right of way, to erect and maintain Telegraph lines along said Railroad, of as many wires as it may deem necessary to its business, and additional lines of poles, whenever the said party of the first part shall so elect."

In the first paragraph of the agreement naming the parties the Western & Atlantic Railroad is erroneously referred to as Western & Atlantic Railroad Company, a corporation. The agreement is signed "The Western & Atlantic Railroad, by Foster Blodgett, Approved Rufus B. Bulloch, Governor." The resolution of the General Assembly of Georgia of October 22, 1887, copied in the record pg. 502, recognizes that this contract was made by Foster Blodgett, as superintendent of the Western & Atlantic Railroad. Thereby the General Assembly of Georgia recognized that the agreement was in fact made by the State of Georgia, which shows that the language in its first paragraph, "Western & Atlantic Railroad Company, a corporation," was a clerical error, and that the State of Georgia was the party of the second part to that agreement.

This contract was plead in defense by the defendant in its original answer (record, pg. 82, par. 10), and attached as an exhibit thereto (record, pg. 116). This was stricken from the answer on plaintiff's motion (record, pg. 128, par. 28, ruling page

131). It was plead in the amendment to the answer (record, pg. 151, par. 11; and in exhibit 22, record, pg. 128, par. 15). This exhibit 22 is referred to in several different pleas as a part thereof (record, pg. 153, 155, 158, 160, 161, and specifically on pg. 161, 162, 163, 166 and 171).

On plaintiff's motion this contract set up in defense in the amendment to defendant's answer was stricken.

The court refused to permit this contract of 1870 to be introduced in evidence as shown by motion for new trial (record, pg. 419, par. 59). In its original answer defendant claimed that the Georgia Statute of November 30, 1915, and its amendment of August 4, 1916, the lease of 1917, the action of the Western & Atlantic Railroad Commission, and any decree of this court granting the relief sought by the plaintiffs thereunder, would impair the obligations of the contract of 1870, and would thereby violate the Constitution of the United States. (record, pg. 107). This defense was stricken on plaintiffs' motion (record, pg. 130, par. 39, 40, 41, ruling record, pg. 131). The same dfeense was set up in paragraph XXV of the amendment to defendant's answer (record, pg. 169). It was stricken on plaintiffs' motion (record, pg. 194, par. 59, ruling record, pg. 195).

The contract of August 18, 1870, is not discussed in either of the opinions of the Justices of the Supreme Court of Georgia.

Contract of 1870 Authorized.

The Georgia Act of January 15, 1852, printed in the record, pgs. 211, 212, authorized the execution of this contract by the Superintendent of the Western & Atlantic Railroad with the approval of the Governor. That Act authorized the Superintendent to "contract for and purchase machinery, cars, materials, workshops and all other things necessary and proper for the construction, repair and equipment of the road and of its general working and business, but all contracts and expenditures which exceed the sum of $5,000.00 shall be subject to the approval of the Governor."

This Act also gave the Superintendent "power with the approval of the Governor, to settle all claims against the Western & Atlantic Railroad."

Contract of 1870 Beneficial to Georgia.

The contract of 1870, as its preamble shows, was "to provide necessary telegraph facilities * * and to a better understanding of the terms on which the party of the first part shall occupy the line of railroad * * and to permanently settle and define the business relations between the respective parties." (Record, pg. 116.) Presumably the Governor and Superintendent knew at that time of the Garst & Bean contract, and of the ratifying statute of 1852. Presumably they knew that the Western Union Telegraph Company claimed to have succeeded to the title of the easements under the contract of 1850 and the Statute of 1852 upon its

purchase from the American Telegraph Co. July 12, 1866. Doubtless there was confusion due to the state of affairs existing durnig the Civil War, and the loss of records by fire shown in the record in this case.

It should also be borne in mind that when the contract of August 18, 1870, was made, the State of Georgia was doubtless negotiating for the first lease of its railroad. That lease signed by Governor Bulloch, December 27, 1870, was executed pursuant to a Georgia Statute of October 25, 1870 (record, pgs. 75, 219). The same Governor who signed this lease, approved the contract of August 18, 1870, with the Western Union Telegraph Company.

It is a fair inference that the railroad could then have been leased by Georgia on more advantageous terms and for a better rental after the contract of August 18, 1870, had been executed, than it could have been leased if such agreement had not been made.

The testimony of MacDonald, Chief Engineer of the N. C. & St. L. Ry. and a witness for the plaintiffs, shows that it was essential to the safe and efficient operation of the railroad that it have the benefit of telegraphic facilities. MacDonald testified (record, pg. 235): "In the year 1870 I should regard a telegraph line along the right of way of a railroad as being indispensable to the suc-

cessful and expeditious handling of trains. It became an absolute necessity as soon as the telegraph was invented and found practicable so far as I know."

The effect of the decision of the Supreme Court of Georgia in A. C. L. Ry. Co. vs. Postal Tel. Co., 120 Ga. 269, is that the establishment of a line of telegraph along a railroad and on its right of way is not detrimental to railroad use of its right of way and does not interfere therewith. In S. F. & W. R. Co. vs. Postal Tel. Co., 115 Ga. 560, the Supreme Court of Georgia held that the legislature of that State has "declared that it was necessary for the public good that telegraph companies should not be compelled to seek a route for the erection of its telegraph lines other than through and upon the right of way of a railroad company."

SUMMARY

1. The first contract relied on (Garst and Bean), and the second contract relied on (The Augusta, Atlanta and Nashville Telegraph Company's charter) are valid contracts, protected by the Federal Constitution, if sections six and nine of the act of 1852 were validly enacted according to the Georgia constitution and laws. We have sought to show that they were. Notwithstanding the decision of a divided court upholding the decree in this particular case between these particu-

lar parties, any other court sitting in Georgia, in any future case, will be obliged by the Georgia constitution, laws and rules of practice to recognize and enforce, with respect to this question, the prior decisions of a unanimous State supreme court as distinguished from the present decision of a court divided three to three. This contention, if sound, as we believe it to be, ends the case, for it means that valid contracts for a perpetual right of way exist, and if they exist they have been impaired.

2. In any event this court is not precluded, in a case involving the claim that a contract has been impaired, from considering and determining for itself, regardless of the conclusions reached by the State courts, whether such enactments, **taken in connection with the other circumstances of the case,** do not create such contractual rights as will be protected by article 1, section 10 of the Federal Constitution. And when they have been recognized as valid enactments for a long term of years by the State authorities, legislative, executive and judicial; when they have been relied on in good faith by the other party, by the investment of large amounts of capital and the continuous performance of service for a long period of years, and when the State has, without objection or repudiation of the statute, continued for a long term of years to receive benefits from such

other party, which benefits could not and would not have been received had it not been for the statute, and which have not been and cannot be returned, the existence of a contract will be recognized by this court without regard to the technical validity of the statutory enactment as such.

3. The contract of 1870 was duly authorized by the State, and is binding on it. The validity of this agreement was challenged by the State's lessee in 1875, and this court said (Western Union v. Western and Atlantic Railroad Co., 91 U. S. 283, 290: 1875) that it was not then necessary to decide the question, but that "so long as this company," (the lessee) "by the use of the wire and the apparatus, gets the benefit of the contract, it must also abide by the terms in other respects." Not only had the State, which was not a party to that suit, received substantial benefit from the contract by reason of its ability on account of the contract to negotiate an advantageous lease, but the State or its lessees have continued to accept the benefit of the contract. Whatever position they might have been able to take with respect to its validity in 1875, it is respectfully urged that with the passing of the ages a point of time must necessarily be reached when this court will feel obliged to say that the contention that the contract is invalid comes too late. The contract of 1870 was

made fifty-four years ago. We earnestly urge that the point of time has been reached.

Respectfully submitted,

JOHN G. MILBURN
(of New York, N. Y.)

FRANCIS R. STARK
(of New York, N. Y.)

ARTHUR HEYMAN
(of Atlanta, Ga.)

WILLIAM L. CLAY
(of Savannah, Ga.)
Attorneys for Western
Union Telegraph Co.

APPENDIX.

EXHIBIT A.

Garst & Bean contract and report of Chief Engineer W. & A. R. R. (record pg. 138), introduced in evidence (record pg. 280).

On the 10th October, 1850, Messrs. Garst & Bean proposed to organize a company of Stockholders and to build for them a Telegraph line from Atlanta to Nashville, which was subsequently made to embrace the Georgia Rail Road and to extend to Augusta, expressing a desire, at the same time of procuring the aid and countenance of the W. & A. R. R. of the State of Georgia. The Company is called the Augusta, Atlanta, and Nashville Telegraph Co. Mr. Garst retired and Mr. Bean prosecuted the enterprise alone. The following correspondence will explain the precise terms of the contract between the Road and Tel. Company.

Chief Engineer's Office, W. & A. R. R.

Atlanta, Oct. 11, 1850.

"Gentlemen:—I have given much reflection to the subject of your note of yesterday, and I have had full and free conversations with His Excellency Geo. W. Towns upon the subject, and we are fully satisfied, not only from the nature of the telegraph, but from the experience of other Roads, that **there is no appendage more valuable in the efficient management of a rail road than a tele-**

graph line, and we have come to the conclusion to submit to you this proposition.

"1. To furnish and erect the posts from Atlanta to Chattanooga, which shall be 24 feet long with four inches in diameter at the little end, and be planted four feet in the ground.

"2. **To grant you the use of our right of way for the Telegraph Company,** and to pass your officers and materials along the road free of charge.

"3. For and in consideration of the foregoing, the W. & A. R. R. is to receive the sum of five thousand dollars to be placed to its credit upon the Books of the Telegraph Company, and instead of interest on that sum, it is to receive dividends as they may be declared from time to time, and to be represented in the meetings of the company to that amount by the Chief Engineer, or such other person as may be appointed to represent the same.

"4. And in further consideration of the foregoing services and grant, all the telegraph offices between Atlanta and Nashville erected by the Company shall be subject to the use of said road free of charge, and said company shall erect as many offices as the road may require in addition to the regular offices of the Company, but the latter shall be at the expense of the road.

Yours respectfully,
WM. L. MITCHELL
Chief Engineer.

"Mr. David W. Garst &
Mr. James M. Bean,
Atlanta, Ga.

Atlanta, Oct. 11, 1850.

"Sir:—We hereby accept the proposition submitted in yours of this date.

Yours respectfully,
D. W. GARST
J. M. BEAN.

"W. L. Mitchell, Esq.
Chief Engineer, &c,
Atlanta, Geo.

"Whereupon I passed an order, that so soon as the Telegraph Company is sufficiently organized to warrant the undertaking, the Resident Engineer and Road Master make all the necessary arrangements for carrying out our part of the foregoing contract; but we did not commence planting the posts till last May, and from a desire to economise as much as possible and do the work with our repairing parties so as not to interrupt their regular duties, the work has progressed slowly, but all the posts have been delivered and half or more are planted, and the wire stretched beyond Kingston, and a branch line has been established from Kingston to Rome and an office placed there.

APPENDIX.

"Our out-lay of money for this job has been but little beyond the cost of the posts, and they have been delivered at fifteen cents apiece. **We expect the line to be in working order as far as Chattanooga in a month or two more, when we expect to be able to infuse additional efficiency in the management and render the anxiety felt for the tardy trains less painful."**

APPENDIX.

EXHIBIT B.

Material portions of contract by Georgia statute of January 27, 1852.

"An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Tel. Co."

"Sec. 1. Be it enacted by the senate and house of representatives of the State of Ga. in general assembly met, and it is hereby enacted by the authority of the same, that James M. Bean, John H. Glover and John P. King, and such persons as now are, or hereafter may be associated with them, including the subscribers in this State who have acquired from Samuel F. B. Morse, the right to construct and carry on the Electro Magnetic Telegraph, by him invented and patented through this State and other States, on the route leading from the city of Augusta, through Atlanta, to the City of Nashville, in the State of Tennessee, be and they are hereby made and declared a body politic and corporate in law, for the purpose of constructing, erecting and maintaining a line of the said telegraph, on the route aforesaid, or any other route through and within this State, and of transmitting intelligence by means thereof, by the name and style of the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

"3. Sec. III. That the said corporation shall have power and authority to build or purchase any connecting or side line in this State, having ac-

quired the right to do so from the owners of Morse's patent, and may enlarge its capital for that purpose.

"6. Sec. VI. **And be it further enacted, that the contract entered into on the eleventh day of October, 1850, by William L. Mitchell, chief engineer of the Western & Atlantic Railroad and D. W. Garst and J. M. Bean on the part of said company, be and the same is hereby ratified and affirmed,** and that at every election, each share shall entitle its holder to one vote, and absent stockholders may vote by agent or proxy, on producing written authority so to do. And in case of an equal number of votes on both sides, the election shall be decided by lot, and the chief engineer of said railroad, or other officer having the chief control of said road for the time being, shall by himself, or his proxy duly authorized, cast the vote to which the State is entitled under said contract.

"8. Sec. VIII. That the said corporation shall have power and authority to contract with any person or persons or bodies corporate, for the purpose of connecting its lines of telegraph with lines out of the State.

"9. Sec. IX. **That the Augusta, Atlanta and Nashville Magnetic Telegraph Company shall have power and authority to set up their fixtures along and across any high road or high roads; and any**

railroad which now or may hereafter belong to this state, and any waters or water courses of this State, without the same being held or deemed a public nuisance, or subject to be abated by any private person: Provided, the said fixtures be so placed as not to interfere with the common use of such roads, waters, or water courses, or with the convenience of any land owner, further than is unavoidable.

"10. Sec. X. That the said corporation shall be bound, upon the application of any of the officers of this State, or of the United States, acting in the event of any war, insurrection, riot, or other civil commotion or resistance of public authority, or in the punishment or preventive of crime, or the arrest of persons charged or suspected thereof, to give to the communications of such officers immediate dispatch; and if any officer, clerk, or operator, of the said corporation shall refuse, or wilfully omit to transmit such communications, or shall designedly alter or falsify the same for any purpose whatsoever, he shall be subject, upon conviction thereof before any court of competent jurisdiction, to be fined and imprisoned according to the discretion of the court, and in proportion to the aggravation of the offence for transmitting such communications. The said corporation shall charge no higher price than shall be usually charged by it for private communications of the

same length. And the said corporation shall be bound in like manner, at all times upon the application of any other person, not an officer of the State or the United States to give like immediate dispatch to each and every communication. And should any officer, clerk or operator, of the said corporation, willfully omit to transmit such communications, or shall alter or falsify the same, he shall be deemed guilty, and punished in like manner as is provided in the foregoing part of this section relative to the communications of public officers.

"12. Sec. XII. That the service of process of any court of this State, shall be legal and valid on said body politic and corporate, if the same shall be left at the office of the company within any district of this State: Provided, the president of the company is absent from, and beyond the limits of the said district, and that this act shall be deemed a public act."

EXHIBIT C.

APPENDIX.

Contract of 1870 between Georgia and the W. U. T. Co. (record pg. 116).

"Articles of Agreement made and entered into by and between The Western Union Telegraph Company, a corporation under the laws of the State of New York, as party of the first part, and The Western and Atlantic Railroad Company,† a corporation under the laws of the State of Georgia, as party of the second part, Witnesseth:

"That in order to provide telegraph facilities for the party of the second part, and to a better understanding of the terms of which the party of the first part shall occupy the line of Railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto, it is mutually contracted and agreed in consideration of the respective obligations herein assumed as follows. to wit:

"The party of the first part agrees:

"First: To set apart on its line of poles along said Railroad a telegraph wire for the exclusive use of said party of the second part.

† See foot note, pg. 99.

"Second: To equip said line of wire with as many instruments batteries and other necessary fixtures as said party of the second part may require for use in its Railroad Stations and to put the same in complete working order.

"Third: To run said wire into all the offices of said party of the first part along the line of said Railroad.

"Fourth: To have said wire set apart for exclusive use of said Railroad Company in the transmission of messages on the business of said railroad on and along the line thereof, and all such messages originating at any point on said road, whether sent from, or received at the stations of said party of the second part, or the stations of said party of the first part on said road, shall be transmitted and delivered free of charge.

"Fifth: When the wire set apart to said Railroad Company shall not be in working order, to transmit free of charge over other wires of said telegraph company, the messages of the Officers and agents of the party of the second part on the business of said Railroad Company between points on said road where said Telegraph Company may have stations giving precedence to messages relating to the movements of trains, over any commercial or paid messages so far as the Statutes of the State, or the United States, may allow such precedence.

"Sixth. To furnish such principal Officers and Agents of the party of the second part, as may be designated by application in writing of the General Superintendent of said Railroad Company, with annual franks or passes, entitling them to send messages free, over all the lines of the party of the first part, Provided, however, that said party of the first part shall be entitled to charge up, and keep account of, all such messages transmitted to or from any point off the line of said road of the party of the second part, at its usual rates for the transmission of commercial messages and for all of such account above the amount of Two Hundred dollars ($200) in any one month, said party of the second part shall pay one half thereof, being half rates for all the business done over the lines of the said party of the first part, above the said sum of Two Hundred dollars ($200) per month, or in any one month.

"And the party of the second part in consideration of, and agreeing to, all the foregoing, further covenants:

"First: That the party of the first part shall have **perpetual right of way,** to erect and maintain Telegraph lines along said Railroad, of as many wires as it may deem necessary to its business, and additional lines of poles, whenever the said party of the first part shall so elect, and the exclusive right of way so far as said party of the second part has the power to grant or secure the

same, and said party of the second part, if it has the right and power to refuse, will not transport poles, wires or other material for any other Telegraph Company, at less than full rates for freight thereon, nor distribute or unload the same at other than the regular Railroad Stations on said road; and should a competing line of telegraph be established along said Railroad, then the party of the first part shall be released from its stipulation to transmit, free of charge, any business of said Railroad Company off or beyond its line of road.

"Second: To transport for said party of the first part, free of charge, all poles, wire and other material required by said party of the first part for the construction, repairs, or maintenance and operation of its lines, and distribute at the places required, such poles, wire and other heavy material as may be needed, along the line of said Railroad, either in the construction of additional lines, or in the repair of the same and of existing lines.

"Third: To transport in any of its passenger trains, the officers and agents of the party of the first part, and put them off at any station of said road, or at any discovered break of the telegraph wires, such officers or agents presenting franks or passes, which shall be supplied at any Ticket Office of said party of the second part, on the application of the Superintendent of the party of the first part.

"Fourth: To maintain all such telegraph stations as may be opened by, or for the use and benefit of, said Railroad Company, at the exclusive cost of the party of the second part; to appoint its own operators thereat; but to retain no operator who refuses, or persistently neglects, to obey the rules and regulations of said party of the first part.

"Fifth: To receive for transmission, and send over the wires and deliver to address at the Railroad Telegraph Offices in towns or at Stations where the party of the first part may have no offices all commercial or other messages paid or to be collected, that may be offered, under the rules of said party of the first part, and make monthly reports thereof, and pay over monthly to said party of the first part, all the tolls collected thereon, and to cause the operators and agents of said party of the second part to observe all the rules and regulations of the party of the first part, with respect to the monthly reports of business and payment of all receipts thereon; and the regular rates of tolls shall accrue to the party of the first part on any and all business received at, or transmitted from, the Telegraph Stations of the party of the second part, except the legitimate Railroad Messages of the said party of the second part.

"Sixth: To pay to said party of the first part the cost of constructing the wire herein designated and set apart to the exclusive use of said party

of the second part, and the cost of equipping the same at the Railroad Stations not already supplied with instruments, batteries and other necessary fixtures, as soon as the cost thereof can be ascertained.

"In Witness Whereof, the parties hereto have by their proper Officers and under their corporate seals duly executed this Agreement this eighteenth day of August, 1870.

"THE WESTERN UNION TELEGRAPH COMPANY,

By Wilm. Orton, President.

Attest: GEORGE WALKER,
Secty. pro Tem. (Seal)

"THE WESTERN ATLANTIC RAILROAD,
By Foster Blodgett.

"Approved. Rufus B. Bullock, Governor.

"By the Governor. H. C. Corson, Secty. Ex. Dept. (Seal)."

† The recital in the first paragraph of this agreement that the party of the second part is a corporation is an evident mistake of the scrivener. The contract was made by Georgia as owner of W. & A. R. R. as is shown by the signatures of the agreement and is so recognized by the General Assembly of Georgia in its resolution of 1887 (record pg. 502).

APPENDIX.

EXHIBIT D.

Material portions of Georgia Statute of November 30, 1915 (record pg. 220-222).

"An Act to provide for the leasing or other disposition of the Western and Atlantic Railroad, and its properties for the creation of the commission to effectuate such purpose, and to define its powers and duties; making an appropriation for the cost of the work required, and for other purposes.

"Sec. 1. There is hereby created a commission to be known as the Western and Atlantic Railroad Commission, which shall be composed of the Governor of the State, the Chairman of the Railroad Commission, G. Gunby Jordan, Judson L. Hand, and Fuller E. Callaway, W. A. Wimbish is hereby named as attorney and counsel for the Commission, and his salary shall be fixed by the Commission.

"Sec. 2. The Commission is hereby charged with the duty and is vested with full power and authority, except as herein provided, to ascertain, consider and determine the terms and conditions upon which the Western and Atlantic Railroad shall be leased, to become effective on the expiration of the present outstanding lease, to wit: Dec. 27, 1919.

"Sec. 3. The Commission shall, among other things, consider and determine, subject to the provisions of this act, the following:

"7. What, if any, property is owned by the Western and Atlantic Railroad not useful for railroad purposes, that could be properly and advantageously disposed of separately from the lease of the road.

"8. What, if any, steps should be taken to assert the right of title of the State to any part of the right of way or properties of the road that may be adversely used and occupied.

"Sec. 5. Among the duties to be required of the Commission shall be included the following: It shall cause to be prepared, if not otherwise obtainable, complete and accurate surveys, maps, profiles and estimates, showing—

"2. The extent and character of every use or occupation of the right of way, tracks and other properties of the road by any person or corporation other than the lessee, and the authority therefor.

"3. The properties not used or apparently not useful for railroad purposes, with an estimate of the market value of such properties, and the use to which they might be applied.

"Sec. 6. Be it further enacted, that the Commission, in pursuance of a resolution to be adopted

by a majority of the members thereof in regular meeting assembled, is hereby fully authorized and empowered to lease and contract for the leasing of the railroad properties known as the Western and Atlantic Railroad, including the terminals, thereof, and its property other than its railroad property, not connected with either of its terminals; and the same may be leased either in its entirety or as a part, whether surface, underground or overhead rights; and the Commission shall recommend and report to the General Assembly what disposition shall be made of the part of the property which the Commission concludes cannot be advantageously leased.

"Sec. 6A. The said Commission shall also include in said report a full and complete inventory of all personal property, rolling stock, equipment, supplies, tools, etc., to be included in the lease, as received from the present lessee, together with a statement of condition and estimated value.

"Sec. 8. The Commission is hereby further instructed and directed to prepare, so that the same may be presented to the General Assembly with the report of the Commission, bills carrying into effect any recommendation which the Commission may make * * with respect to what steps should be taken to assert the right and title of the State to any part of the right of way of any part of the road that may be adversely used or occupied; and with respect to any other recommenda-

tions which, in its opinion, and which may require legislation by the General Assembly of Georgia to fully, completely and adequately protect all the interest of the State of Georgia, in regard to said road and all of its parts and properties, whether reckoned as surface, overhead or underground rights.

"Sec. 11. The persons, association or corporation accepted as lessees under this act, if not already a corporation created under the laws of Georgia, shall from the time of such lease being entered on the executive minutes, and until after the final adjustment of all matters springing out of said lease contract, become a body politic and corporate under the laws of this State, under the name and style of the Western & Atlantic Railroad, which body corporate shall be operated only from the time of their taking possession of said road as lessees and it shall have the power to sue and be sued on all contracts made or to be performed, and all torts committed by said company, in like manner and time and place as other railroad companies operating railroads in this State may sue and be sued, after the execution of said lease or for any cause of action which may accrue to said company or to which it may become liable.

" * * The Principal office and place of business of said company shall be in this State; provided that nothing in this act shall be construed as an

amendment of the charter of any corporation which may lease said road.

"Sec. 12. The principal office of the Western & Atlantic Railroad shall be within the limits of the State of Georgia.

"Sec. 17. The lessee or lease company hereunder shall be subject to, and required to observe and obey, all just and reasonable rules, orders, schedules of freight and passenger tariffs as may be prescribed by the laws of this State, or the Railroad Commission of Georgia in like manner and to the same extent as other railroads in this State."

EXHIBIT E.

APPENDIX.

Material portions of the Georgia statute of August 4, 1916, (record pgs. 230-231).

"An Act to amend an act approved November 30, 1915, providing for the leasing or other disposition of the Western & Atlantic Railroad and its properties, and for the creation of a Commission to effectuate such purpose, and for other purposes, by adding thereto other provisions further defining the powers and duties of the said commission; and for other purposes.

"Section 5-A. The said Commission, subject to direction in specific cases by the General Assembly, is hereby given full power and authority in its discretion to deal with and dispose of any and all encroachments upon, and uses and occupancies of any part of the right of way and properties of the Western and Atlantic Railroad by any person other than the present lessee, and its tenants and licensees under and during the term of the present lease, whether such encroachments, use or occupancy be permissive or adverse, and whether with or without claim of right therefor. The said Commission is hereby fully authorized and empowered to determine whether they, or any of them shall be moved and discontinued, or whether they, or any of them shall be permitted to remain, and, if so, to what extent and upon what terms and condi-

tions. The said Commission is further authorized to adjust, settle, and finally dispose of any and all controversies that may exist or that may arise with respect to any adverse use or occupancy of any part of said right of way and properties of the Western & Atlantic Railroad, in such manner and upon such terms and conditions as it may deem the best interests of the State require; and all contracts and agreements that said commission may make or enter into in settlement or disposition of all matters touching such adverse uses and occupancies shall be binding upon the State. The said Commission is further authorized and fully empowered to take such action as it may deem proper and expedient to cause the removal and discontinuance of any encroachment, use or occupancy of said right of way and properties which in its opinion should be removed or discontinued, and to this end the Commission is authorized and empowered to institute and prosecute, in the name and behalf of the State of Georgia, such suits and other legal proceedings as it may deem appropriate in protection of the States' interest, or the assertion of the State's title."

APPENDIX.

EXHIBIT F.

Resolution of W. & A. R. R. Commission (record pgs. 39-40), introduced in evidence (record pgs. 231-232).

"Whereas, the Nashville, Chattanooga & St. Louis Railway, as Lessee of the Western & Atlantic Railroad, under the lease beginning December 27th, 1919, has represented to this Commission that the Western Union Telegraph Company is adversely using and occupying the right of way of said railroad by telegraph lines, poles, wires and other appurtenances without authority therefor from the State of Georgia, and against the consent of the Nashville, Chattanooga & St. Louis Railway.

"And Whereas, the said Nashville, Chattanooga & St. Louis Railway has requested this Commission to take appropriate action for the removal of this encroachment and the discontinuance of this adverse use in pursuance of the Act creating this Commission as amended August 4, 1916, and of Paragraph 14 of the new lease contract:

"And Whereas, the Counsel for this Commission has reported that the adverse use and occupancy of said right of way by the Western Union

Telegraph Company is without lawful authority from the State of Georgia; and that the institution of appropriate procedings for the removal of said encroachment and the discontinuance of said use is within the purview of said Act of August 4th, 1916, and within the contemplation of Paragraph 14 of the new lease contract dated May 11th, 1917.

"Now Therefore, be it resolved, That William A. Wimbish, Counsel for this Commission, be, and he is hereby, authorized and directed to institute and prosecute, in the name and behalf of the State of Georgia, such suits and legal proceedings as may be appropriate for the removal of said encroachment and the discontinuance of said use: Provided, the Nashville, Chattanooga & St. Louis Railway, as such lessee, shall join in such suits and proceedings and defray the proper costs and expenses thereof without liability over against the State."